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# THE PRINCIPLES OF

# INTERNATIONAL LAW

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213

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## PREFACE TO THE SEVENTH EDITION

The lamented death of the author of this book came at a particularly unfortunate moment. Those who had the privilege of his acquaintance or the least knowledge of his works were impressed by the eagerness with which he followed the progress of International Law and by his enthusiasm in the cause of international peace. At the very moment when these qualities and the keen intellect which tempered them were needed to estimate all the changes produced by the great war, he was taken from us. His attitude towards the effects of the catastrophe of 1914 had on broad general lines been indicated in the lectures which he delivered during the war. He never wavered in his belief in the system which he had so faithfully taught in his long and distinguished academic career, and he earnestly supported the nascent League of Nations, which lost in him a wise and fearless champion.

That the two root ideas of the Covenant of the League—the prevention of unnecessary war, and the promotion of international social and economic coöperation—are sound, nobody can doubt. The urgent need of the League now is to educate public opinion as to its exact aims and limitations. For it is undeniable that the first of the two root ideas has been misstated by the impatient pessimist and misunderstood by the still more impatient optimist. To the one, the League is bound to fail because it proposes to abolish war. To the other, it ought to succeed for precisely the same reason. And as the reason does not exist, both start from a false premiss. For war is actually recognized and adopted as a police measure by the Covenant. What it seeks to prevent is not all war, but all unnecessary war. Nor has the relative importance of the second root idea of the Covenant been grasped generally. There is a tendency to underrate its significance, and to regard international coöperation as a conception independent of the prevention of needless wars; whereas the two are intimately connected. International coöperation must tend to stimulate international inter-

course and, as a consequence, to remove international prejudice and to foster antipathy to wars of aggression. The extirpation of disease is even more important than preventing the spread of it, and, on that principle, it is quite as essential to take positive steps to make unnecessary wars impossible as to adopt the negative method of insurance against the risk of them.

The League of Nations has already achieved results by no means despicable. It will do still better when it can get stronger official backing from the more powerful of the states that are members of it, when it comprehends all the civilized states that are not at present included, and when public opinion is better educated in the direction which has been indicated.

In the Covenant of the League, a curious parallel seems to have been instituted, consciously or unconsciously, between the society of nations in the twentieth century and the primitive society of legendary Rome, or of Anglo-Saxon times. As the *homo sacer* or the outlaw was punished by being cut off from the community, so is the law-breaking state to be thrust out by the neighbors with whom it will not live in peace. And, just as the legal historian of to-day can point to *sacratio capitis* and outlawry as the blunt and clumsy instruments of archaic nations for keeping internal order, so perhaps will the perfectly organized international society of the future—how distant none can tell—regard the personal and economic boycott created by the Covenant of the League of Nations. From this point of view, the Covenant appears to be but one course of masonry in the future temple of International Law. Only a short-sighted critic would mistake it for the temple itself, and only one who is ignorant of the architecture of law would find fault with it for not being the finished structure. It is to some extent the ill fate of International Law that its growth is intensely self-conscious compared with the growth of municipal law, and that is precisely because we have long had at least two ripe systems of municipal law to contrast with it, —the English Common Law, and the developed Roman Law. And we are apt to grow impatient because International Law does not exhibit sooner the bloom of these mature systems. The fact is that the law of nations is in the twentieth century

where the law of many an individual nation was in the tenth century. This is not to say that it will take another ten centuries for International Law to reach its full growth. The time may be far shorter, but speculation on its length is idle. It is enough that after the agony of 1914–1918 we can say *e pur si muove.*

The task of preparing the present edition has not been a light one. The material which had to be dealt with since the fourth edition in 1910 (the fifth and sixth were practically mere reprints of this) was so considerable as to make this issue a revision rather than a new edition. The new portions of the text have been inserted in square brackets in common justice to author and reviser. Unless the book was to outgrow the span which a student may reasonably expect, other matter had to be abridged. This, it is hoped, has been done without injury to continuity of argument. The verification of references has been a troublesome affair. Practically none had been effected since the first edition, and libraries cannot be expected to keep every edition of every book on International Law to which an author may chance to refer.

Where recent events have made the law controversial, the editor has endeavoured to give his readers grounds on which they can form a judgment, and where he has ventured to express his own opinion, it is hoped that it has not been cast in a dogmatic form. He desires to express his sincere thanks to Mrs. E. A. Lawrence for affording him access to the author's papers; to Dr. Pearce Higgins, the Whewell Professor of International Law, who has read the new matter in the book and has given many invaluable suggestions in connection with it; to Sir Cecil J. B. Hurst, of the Foreign Office, who has kindly verified several points; to Mr. Austin H. Johnson for his revision of the indices; and to the publishers for their assiduous and courteous coöperation.

P. H. W.

## PREFACE TO THE FIRST EDITION

International Law may be regarded as a living organism, which grows with the growth of experience and is shaped in the last resort by the ideas and aspirations current among civilized mankind. He who would accurately describe its present condition must sketch the outlines of its past history and gauge the strength of the forces which are even now acting upon it. He must understand the processes whereby it reached the shape in which we see it and forecast the changes which will accompany its future growth. The perfect publicist must take all philosophy, all history, and all diplomacy to be his province. He must weigh in the balance of absolute impartiality the actions of statesmen and the decisions of judges. He must be familiar in equal degree with the rough amenities of camps and the stately etiquette of courts. I lay no claim to the possession of these exalted qualifications. I have but attempted to trace the development of International Law in such a way as to show on the one hand its relation to a few great ethical principles and on the other its dependence upon the hard facts of history. The severest critic cannot be more sensible than I am of the deficiencies of my work. They are due partly to the greatness of the task compared with the powers of the doer, and partly to untoward circumstances of change and unrest which hampered its progress from beginning to end. I shall be more than satisfied if I have succeeded in placing before students of political science a clear and readable outline of one of the most important branches of their subject.

The book is divided into four parts. The first deals with the nature and history of International Law, and in the order of thought precedes the others, which set forth the rules observed among states during peace, war, and neutrality. But nevertheless it will be wise to leave a careful study of the questions discussed in the first three chapters till the rest of the work has been mastered. Some knowledge of the usages

of international society is necessary before the student is in a position to appreciate the tendencies of opposing schools of thought among publicists. Nor need any inconvenience arise from this mode of procedure; for nothing is easier than to turn back at the end of a book and read again with an educated eye the early pages, whose discussions on definition and method puzzled the mind not yet familiar with the subject of which they treat. I have striven throughout to avoid unnecessary controversy. When I have been obliged to wrestle with philosophical problems or historical puzzles, I have endeavored to avoid the reproach of mistaking obscurity for profundity. But on the other hand I have recognized that difficulties are not overcome when they are shirked, and my aim has always been to bring to bear upon them the best resources at my disposal. If I have failed, the fault is due not to inability to see the mark, but to lack of power to hit it.

In a work written in English, and intended in the main for British and American readers, it is natural that most of the cases should be taken from British and American history. I have so taken mine of set purpose. The more the two great English-speaking peoples know of each other the better friends they will be; and on their friendly coöperation depend the fairest hopes for the future of humanity. No one who has taught, as I have taught, on both sides of the Atlantic, can have failed to notice that the influence of old controversies and misunderstandings has not entirely passed away, even among the educated classes. I have approached these questions with a sincere desire to show to each side the strength of the other's case and deal out impartial justice on every occasion. If I have ever inclined the balance too much in favor of my own country, the error is that of one who, were he not an Englishman, would ask no better fate than to be an American.

The story I have to tell will be found in the text. I have not relegated important matter to notes, nor printed on my pages long quotations from other authors or excerpts from original authorities. I have preferred the much more laborious task of extracting their substance and putting it in my

own words into the body of the book, which I trust has gained thereby in decrease of bulk and increase of readableness. But I have taken care to provide the means of checking my assertions. At the bottom of nearly every page will be found references, by the use of which teachers and students can amplify or correct the statements in the text and men of affairs obtain the more detailed information they may want for practical purposes. The notes are, I hope, sufficient. My object has been to make them adequate without overloading them with matter. I have not, for instance, referred to a large number of writers of all degrees of authority, when the citation of a few great ones gave the necessary support to my argument; nor have I quoted a dozen cases, when one or two were enough. I have also taken care that most of the cases given in the text should be something more than mere names to my readers. The material facts are almost always described, so that the points of law may be seen in relation to the actual circumstances which were before the courts. The table of contents has been so arranged as to afford an analysis of the whole book.

The writer of every new work on International Law is the debtor of all who have gone before him in his particular sphere. His best acknowledgments are to be found in his references and quotations. The extent of my own obligations to others may be roughly measured by the frequency with which their names occur in my notes; but I cannot refrain from making special mention of two. I have been helped at every turn by the robust judgment and incisive arguments of Mr. R. H. Dana, and the judicial reasoning and encyclopedic knowledge of Mr. W. E. Hall. Both have joined the majority, not indeed too soon for fame, but too soon for the expectations of those who profited by their labors. Mr. Hall was taken from us in the zenith of his powers, and Mr. Dana had collected the materials for what I venture to think would have been the best of all books on International Law, had he lived to write it. To the memory of both I offer my humble tribute of reverence and admiration.

T. J. Lawrence.

# CONTENTS

## PART I—INTRODUCTORY

### CHAPTER I

#### The Definition and Nature of International Law


| Section | | Page |
|---|---|---|
| 1. | The definition of International Law. Difficulty of making it quite satisfactory | 1 |
| 2. | The precepts of International Law are rules, whether they are or are not laws | 2 |
| 3. | International Law is generally observed by states, though here and there some of its commands are disregarded | 2 |
| 4. | International Law applies to civilized states only, though it is not confined to Christian states | 3 |
| 5. | International Law regulates the conduct of states in their mutual dealings, hostile as well as pacific | 4 |
| 6. | International Law includes the rules of maritime capture, but not the rules for determining which of two conflicting systems of law shall prevail in matters of private right | 4 |
| 7. | The History of the names given to the science | 6 |
| 8. | The two problems: (1) Is International Law really law? (2) Are its principles and rules derived from intuition or experience? | 8 |
| 9. | Is International Law really law? | 8 |
| 10. | Does International Law proceed by the *a priori* or by the historical method? | 10 |
| 11. | The place of ethical considerations in International Law | 12 |
| 12. | Summary of results attained in this chapter | 13 |


### CHAPTER II

#### The History of International Law


| | | |
|---|---|---|
| 13. | The history of International Law may be divided into three periods | 14 |
| 14. | In the First Period—from the earliest times to the Roman Empire—states as such had no mutual rights and duties. Kinship was the basis of the relations between Hellenic communities | 14 |
| 15. | Republican Rome possessed no true International Law | 16 |
| 16. | In the Second Period—from the Roman Empire to the Reformation—it was deemed that the relations of states must be regulated by a common superior. For a long time the Roman Emperor was such a superior | 17 |

SECTION PAGE

17. The Holy Roman Empire and the Papacy claimed universal authority during the Middle Ages ..... 18
18. The idea of a common superior dies out at the Reformation ... 20
19. For a time there was grave danger of utter lawlessness in international affairs ..... 21
20. Influences which made for improvement during the Middle Ages 21
21. In the Third Period—from the Reformation to the present time—the ruling principle is that states are units in a great society, the members of which have mutual rights and obligations ..... 24
22. The career of Grotius, the great agent in effecting this change in ideas ..... 26
23. Causes in the influences exercised by Grotius ..... 27
24. The law of nature as conceived by Grotius ..... 29
25. The theory of a law of nature criticised ..... 30
26. Its effect in obtaining acceptance for an improved International Law ..... 32
27. The Grotian system contained a second principle, which supported it when the first failed. Two senses of *jus gentium* .. 32
28. Two senses of *jus gentium* ..... 33
29. The growing recognition of the fact that International Law rests on the consent of the nations ..... 34
30. Growth of the consensual theory ..... 37
31. The development of a statute book of the law of nations ..... 39
32. The rudiments of an international legislature ..... 41
33. The possibilities of the future ..... 45

## CHAPTER III

### THE SUBJECTS OF INTERNATIONAL LAW

34. There are grades among the subjects of International Law .... 47
35. Sovereign states ..... 47
36. Some amount of civilization, territory, and importance necessary before a sovereign state can be regarded as a subject of International Law ..... 50
37. The kinds of fully sovereign international persons ..... 51
38. Part sovereign states ..... 54
39. Client states ..... 56
40. Confederations ..... 60
41. Civilized belligerent communities not being states ..... 64
42. The doubtful cases of individuals and corporations ..... 65
43. Anomalous cases—colonial protectorates, neutralized states, Egypt, the papacy ..... 69
44. Admission into international society—states hitherto deemed alien in civilization and ideas ..... 82

SECTION PAGE
45. States formed by civilized men in hitherto uncivilized countries 83
46. States whose independence is recognized in consequence of separation from some other state 85
47. The various methods of recognition of independence 87
48. Continuity of state life 88
49. State succession 89

## CHAPTER IV

### THE SOURCES AND DIVISIONS OF INTERNATIONAL LAW

50. The meaning of the phrase the sources of International Law... 95
51. (1) The works of great publicists 96
52. (2) Treaties 99
53. (3) Decisions of prize-courts, international conferences, and arbitral tribunals 106
54. (4) State papers other than treaties 108
55. (5) Instructions issued by states for the guidance of their own officers and tribunals 110
56. Divisions of International Law. The old divisions useless. A new one suggested 111
57. Normal rights and obligations are connected with independence, property, jurisdiction, equality, and diplomacy; abnormal rights and obligations with war and neutrality 113

# PART II—THE LAW OF PEACE

## CHAPTER I

### RIGHTS AND OBLIGATIONS CONNECTED WITH INDEPENDENCE

58. Definition and nature of the right of independence 115
59. Part-sovereign states not fully independent 116
60. Voluntary restrictions upon the freedom of action of sovereign states 116
61. Involuntary restrictions upon the freedom of action of sovereign states 118
62. Intervention—its essential characteristics 119
63. General considerations with regard to intervention 121
64. Intervention in pursuance of a legal right to intervene 121
65. Interventions for which no strict legal right can be claimed—those based on the necessity of self-protection 125
66. Interventions on the ground of humanity 127
67. Interventions for the preservation of the balance of power... 128
68. Inadmissible grounds of intervention 131
69. Various conclusions concerning intervention 133
70. The doctrine of non-intervention 134

## CHAPTER II

### Rights and Obligations Connected with Property


| Section | | Page |
|---|---|---|
| 71. | States are political units capable of holding both territorial and non-territorial possessions | 136 |
| 72. | Extent of a state's territorial possessions | 137 |
| 73. | Is the air above a state a part of its territory? | 143 |
| 74. | Modes whereby states can acquire territory: (1) Occupation | 145 |
| 75. | (2) Accretion | 156 |
| 76. | (3) Cession | 157 |
| 77. | (4) Conquest | 159 |
| 78. | (5) Prescription | 160 |
| 79. | A state may exercise power over territory as (1) a part of its dominions | 161 |
| 80. | (2) A protectorate | 162 |
| 81. | (3) A sphere of influence | 166 |
| 82. | A state may acquire power over (4) a leased territory | 168 |
| 83. | Less important modes of exercising power over territory | 171 |
| 84. | Chartered companies and pioneer work | 174 |
| 85. | Rights over waters: (1) Claims to sovereignty over the high seas | 175 |
| 86. | (2) The American claim to prohibit seal-fishing in Bering Sea | 178 |
| 87. | (3) Claims to revenue and sanitary jurisdiction beyond the marine league | 182 |
| 88. | (4) The right of innocent passage | 182 |
| 89. | (5) The special case of the Dardanelles and the Bosphorus | 184 |
| 90. | (6) The legal position of interoceanic ship canals | 186 |
| 91. | (7) The use of sea fisheries | 189 |
| 92. | (8) The navigation over great arterial rivers | 193 |


## CHAPTER III

### Rights and Obligations Connected with Jurisdiction


| | | |
|---|---|---|
| 93. | A state has jurisdiction over all persons and things within its territory, with a few exceptions | 199 |
| 94. | Natural-born subjects | 199 |
| 95. | Naturalized subjects | 201 |
| 96. | International questions connected with naturalization | 203 |
| 97. | Domiciled Aliens | 206 |
| 98. | Travellers passing through its territory | 207 |
| 99. | Rules relating to various kinds of things within the territory | 207 |
| 100. | A state has jurisdiction over all its ships on the high seas | 210 |
| 101. | A state has jurisdiction over its subjects abroad | 213 |
| 102. | A state has jurisdiction over all pirates seized by its vessels | 214 |

SECTION PAGE
103. Distinction between piracy by the law of nations and piracy by municipal law. The slave trade ... 218
104. The claims to jurisdiction over foreigners for offenses committed abroad ... 221
105. Exceptions to ordinary rules about jurisdiction: (1) Foreign sovereigns and their suites ... 223
106. (2) Diplomatic agents of foreign states ... 224
107. (3) Public armed forces of foreign states ... 225
108. The case of political offenders and fugitive slaves ... 228
109. (4) Subjects of Western states resident in Eastern countries ... 232
110. Extradition. A state is not bound to grant it in the absence of a treaty obliging it to do so ... 235
111. The conditions generally inserted in extradition treaties ... 238

## CHAPTER IV

### RIGHTS AND OBLIGATIONS CONNECTED WITH EQUALITY

112. The meaning and utility of the principle of equality ... 245
113. Facts hard to reconcile with the theory of equality ... 245
114. The present, a period of transition ... 252
115. The state system of the American continent ... 255
116. The Pan-American Movement ... 262
117. Matters of ceremony and etiquette connected with the doctrine of equality ... 265
118. Rules of precedence of states and their representatives ... 267
119. Titles and their recognition by other states ... 269
120. Maritime ceremonials ... 269

## CHAPTER V

### RIGHTS AND OBLIGATIONS CONNECTED WITH DIPLOMACY

121. Diplomatic intercourse necessary. Growth of resident embassies ... 271
122. Development of different kinds of diplomatic ministers ... 272
123. Classification of diplomatic ministers ... 274
124. Sovereign states possess the right of legation fully; part sovereign states possess it to a limited extent ... 276
125. The rupture of diplomatic relations is a serious step, which generally ends in war ... 277
126. But a state may without offense refuse on good grounds to receive a particular individual, or ask for his recall ... 278
127. Commencement and termination of diplomatic missions, and the ceremonies connected therewith ... 281

SECTION PAGE
128. Diplomatic immunities—their general nature and the reason for their existence ..... 285
129. Immunities connected with the person of the diplomatic agent .. 286
130. Immunities connected with the property of the diplomatic agent 292
131. Consuls—their position and immunities ..... 296
132. Treaty-making power. Ratification of treaties ..... 299
133. The interpretation of treaties ..... 302
134. The Obligation of treaties ..... 302

## PART III—THE LAW OF WAR

### CHAPTER I

#### THE DEFINITION OF WAR AND OTHER PRELIMINARY POINTS

135. The nature and definition of war ..... 309
136. Reprisals, or methods of putting stress upon a state by violence which is not held to amount to open war ..... 311
137. Embargo ..... 314
138. Pacific blockade ..... 316
139. The value and admissibility of reprisals ..... 320
140. Declaration of war ..... 321
141. The meaning and effects of recognition of belligerency ..... 328
142. Recognition of insurgency ..... 332
143. The immediate legal effects of the outbreak of war ..... 333
144. The effect of war on treaties to which the belligerents and other powers are parties ..... 337
145. The effect of war on treaties to which the belligerents only are parties ..... 341
146. Omitted (Note) ..... 344

### CHAPTER II

#### THE ACQUISITION BY PERSONS AND PROPERTY OF ENEMY CHARACTER

147. Enemy character and the extent to which individuals possess it .. 345
148. (1) Persons enrolled in the enemy's fighting forces ..... 345
149. (2) Crews of merchant vessels of the enemy ..... 348
150. (3) Those who follow an army without directly belonging to it 349
151. (4) Persons living in an enemy country ..... 350
152. (5) Residents in military places under military occupation of the enemy ..... 353
153. (6) Neutrals who have houses of trade in the enemy's country 354
154. British and American theory of domicile in relation to questions of belligerent capture ..... 354

SECTION PAGE
155. Enemy character and the extent to which property possesses it: (1) Property of the enemy state ... 359
156. (2) The property of enemy subjects ... 359
157. (3) Neutral property incorporated in enemy commerce or subject to enemy control ... 362
158. (4) The produce of estates owned by neutrals in places under enemy control, while it belongs to the owner of the soil ... 363
159. Summary of the circumstances under which the enemy character is acquired by property ... 364

## CHAPTER III

### THE LAWS OF WAR WITH REGARD TO ENEMY PERSONS

160. The treatment accorded to enemy subjects found in a state at the outbreak of war ... 367
161. Ancient and modern ideas of the violence permissible in war ... 371
162. Modern military codes ... 372
163. Treatment of combatants: (1) The grant of quarter ... 375
164. (2) The care of prisoners of war ... 377
165. (3) The care of the sick, wounded, and shipwrecked ... 384
166. (4) The prohibition of certain means of destruction ... 395
167. The gradual amelioration of the condition of non-combatants ... 395
168. The exemption of ordinary non-combatants from personal injury 397
169. The cessation of the barbarities inflicted upon the inhabitants of captured towns ... 398
170. Protection granted those who tend the sick and wounded ... 399

## CHAPTER IV

### THE LAWS OF WAR WITH REGARD TO ENEMY PROPERTY ON LAND

171. Property of the enemy government found within a state at the outbreak of war ... 400
172. Real property of enemy subjects found within a state at the outbreak of war ... 400
173. Personal property of enemy subjects found within a state at the outbreak of war ... 402
174. The special case of stock held by enemy subjects in the public debt ... 405
175. Booty ... 406
176. Invasions historically considered ... 408
177. The essential elements of military occupation ... 411
177a. Rights over inhabitants of occupied territory ... 413
178. Rights over state property gained by occupation ... 417
179. Rights over private property gained by military occupation ... 421
180. The special case of Requisitions, Contributions, and Fines ... 423

## CHAPTER V

### The Laws of War with Regard to Enemy Property at Sea


| Section | | Page |
|---|---|---|
| 181. | The national character of vessels | 431 |
| 182. | The extent to which vessels of the enemy are liable to belligerent capture | 432 |
| 183. | Sea-borne goods of the enemy | 443 |
| 184. | The practice of ransom | 447 |
| 185. | Recapture at sea and the *jus postliminii* | 448 |
| 186. | The right of search | 451 |
| 187. | Ships' papers | 457 |
| 188. | The nature of prize courts and the responsibility of the state for their decisions | 459 |
| 189. | The jurisdiction of prize courts | 463 |
| 190. | The procedure of prize courts | 464 |
| 191. | The destruction of prizes at sea | 465 |
| 192. | The International Prize Court | 470 |
| 193. | History of the proposal to prevent private property from the capture at sea in time of war | 477 |
| 194. | Arguments for and against the proposed exemption | 481 |


## CHAPTER VI

### The Agents, Instruments, and Methods of Warfare


| | | |
|---|---|---|
| 195. | The agents of warfare | 489 |
| 196. | (1) Guerilla troops | 490 |
| 197. | (2) Levies *en masse* | 493 |
| 198. | (3) Savage and imperfectly civilized troops | 496 |
| 199. | (4) Spies | 498 |
| 200. | The instruments and methods of warfare: (1) Privateers | 500 |
| 201. | (2) A volunteer navy | 502 |
| 202. | (3) Converted merchantmen | 505 |
| 203. | (4) Submarine mines | 511 |
| 203a. | (5) Submarines | 518 |
| 204. | (6) Bombardments | 521 |
| 205. | (7) Projectiles | 529 |
| 206. | (8) Devastation | 534 |
| 207. | (9) Stratagems | 538 |
| 208. | (10) Assassination | 540 |
| 209. | (11) Poison | 541 |
| 209a. | The sanctions of the laws of war | 543 |

## CHAPTER VII

### The Non-Hostile Intercourse of Belligerents


| Section | | Page |
|---|---|---|
| 210. | The nature of non-hostile intercourse | 548 |
| 211. | (1) Flags of truce | 548 |
| 212. | (2) Cartels | 550 |
| 213. | (3) Passports, safe-conducts, and safeguards | 551 |
| 214. | (4) Licenses to trade | 552 |
| 215. | (5) Capitulations | 553 |
| 216. | (6) Truces and Armistices | 555 |


## CHAPTER VIII

### Peace and the Means of Preserving Peace


| | | |
|---|---|---|
| 217. | The termination of war | 559 |
| 218. | The legal consequences of the restoration of peace | 560 |
| 219. | The simultaneous growth of a horror of war and preparations for war | 563 |
| 220. | International commissions of inquiry, and special mediation | 564 |
| 221. | Arbitration | 566 |


# PART IV—THE LAW OF NEUTRALITY

## CHAPTER I

### The Nature and History of Neutrality


| | | |
|---|---|---|
| 222. | The definition of Neutrality. The varied elements which have gone to form its law | 582 |
| 223. | The history of neutrality | 583 |
| 224. | Neutrality and neutralization. The correct meaning of the latter | 590 |
| 225. | Neutralized states | 592 |
| 226. | Neutralized portions of unneutralized states | 595 |
| 227. | Neutralized waterways | 599 |
| 228. | The divisions of the law of neutrality | 601 |


## CHAPTER II

### The Duties of Belligerent States Towards Neutral States


| | | |
|---|---|---|
| 229. | A belligerent state ought: (1) To refrain from carrying on hostilities within neutral territory | 603 |
| 230. | (2) To leave unmolested as far as possible neutral submarine cables | 607 |

SECTION PAGE
231. (3) To abstain from making on neutral territory direct preparations for acts of hostility ..... 612
232. (4) To obey regulations made for the protection of neutrality. 617
233. (5) To make reparation to any state whose neutrality it may have violated ..... 621

## CHAPTER III

### THE DUTIES OF NEUTRAL STATES TOWARDS BELLIGERENT STATES

234. Duties of neutral states to be considered under five heads ..... 628
235. (1) Duties of abstention ..... 628
236. (2) Duties of prevention ..... 632
237. (3) Duties of acquiescence ..... 651
238. (4) Duties of restoration ..... 652
239. (5) Duties of reparation ..... 654
240. The powers possessed by neutral states for the protection of their neutrality ..... 655

## CHAPTER IV

### ORDINARY NEUTRAL COMMERCE

241. The conflict between belligerent and neutral interests in the matter of trade ..... 658
242. The history of the rules of ordinary maritime capture ..... 660
243. The Declaration of Paris ..... 666
244. Present condition of rules of ordinary maritime capture ..... 670
245. Convoy ..... 672

## CHAPTER V

### BLOCKADE

246. The nature and history of blockade ..... 678
247. The various kinds of blockade ..... 683
248. The heads of the law of blockade ..... 685
249. What constitutes an actual blockade ..... 686
250. The knowledge of the party supposed to have offended ..... 692
251. Violation of blockade ..... 694
252. The penalty for breach of blockade ..... 698

## CHAPTER VI

### TRADE IN CONTRABAND OF WAR

253. The nature of contraband of war ..... 704
254. Neutral states are not bound to stop contraband trade on the part of their subjects ..... 705

SECTION PAGE
255. What articles are contraband of war ..... 709
256. Alterations and conditions including destination ..... 720
257. The doctrine of continuous voyages ..... 725
258. The essentials of guilt in the matter of contraband ..... 729
259. The penalty for carrying contraband ..... 731

## CHAPTER VII

### UNNEUTRAL SERVICE

260. The nature and name of the offence ..... 737
261. The lesser offences of unneutral service ..... 740
262. The graver offences of unneutral service ..... 743

# THE PRINCIPLES OF INTERNATIONAL LAW

## PART I—INTRODUCTORY

### CHAPTER I

#### THE DEFINITION AND NATURE OF INTERNATIONAL LAW

§ 1

INTERNATIONAL LAW may be defined as *the rules which determine the conduct of the general body of civilised states in their mutual dealings.*

The definition of International Law.

Difficulty of making it quite satisfactory.

In International Law, as in other sciences, a good definition is one of the last results to be reached. Until the nature and scope of any study are clearly seen, its boundaries cannot be determined with perfect accuracy. A definition, in order to be satisfactory, ought to give with precision the marks whereby the thing to be defined is distinguished from all other things; and unless it does this it is either incomplete or misleading. We may expect that different definitions of a science will be given, not only in its infancy, before its nature and limits are clearly understood, but even in its maturity, if those who cultivate it differ as to its methods and as to the extent of the subject-matter with which it deals. International Law is in this latter predicament. It has been studied for ages; but though its expounders are gradually approaching the adoption of a consistent body of doctrine, they have not yet come to an agreement upon such questions as the exact character of the processes to be followed in their reasoning, or the relation of their science to Ethics and Jurisprudence. Accordingly each writer's definition is colored, to a certain extent, by his

own views; and the definition at the head of this chapter is no exception to the general rule. It regards International Law, not as an instrument for the discovery and interpretation of a transcendental rule of right binding upon states as moral beings whether they observe it or not in practice, but as a science the chief business of which is to find out by observation the rules actually followed by states in their mutual intercourse, and to classify and arrange these rules by referring them to certain fundamental principles on which they are based.

## § 2

It will be seen that in the definition we have given, no mention is made of rights and obligations of states. These terms have been carefully excluded in order to avoid the controverted question whether International Law is, strictly speaking, law or not. If it be law proper, then it confers rights and creates obligations; but if the term *law* is improperly applied to it, we cannot with propriety speak of rights and obligations as flowing from it. In framing a definition, it is advisable to include as little controverted matter as is possible without sacrificing clearness to a desire of avoiding difficulties. Acting upon this principle, we have used the neutral term *rules* instead of the disputed word *laws*, and have discarded altogether the phrase *rights and obligations*. The question whether our science is properly described as law will be found discussed further on;[1] but whichever side in the controversy we take, we may adopt the definition at the head of this chapter.

The precepts of International Law are rules, whether they are or are not laws.

## § 3

The governments of all states, whether civilized or barbarous, are compelled to exert activity, not merely in conducting their internal affairs, but also in regulating their conduct towards the governments and peoples of other states. They cannot act as if they were alone in the world, for the simple reason that they are not alone. The coexistence of states on the surface of the earth renders it necessary for them to

[1] See § 9.

pay some sort of regard to one another; and the more civilized the states, the more intimate the intercourse. Commerce, intermarriage, scientific discovery, community of religion, harmony in political ideas, mutual admiration as regards achievements in art and literature, identity of interests or even of passions and prejudices,—all these, and countless other causes, tend to knit states together in a social bond analogous to the bond between the individual man and his fellows. But just as men could not live together in a society without laws and customs to regulate their actions, so states could not have mutual intercourse without rules to regulate their conduct. The body of such rules is called International Law. Like other law, it is occasionally disregarded by some of those who live under it; and owing to the absence of coercive force to compel nations to obedience, it is more liable to be violated than is the law of the land. But, all statements to the contrary notwithstanding, it is generally observed. It does "determine the conduct of the *general body* of civilized states"; and this is all we assert in our definition.

International Law is generally observed by states, though here and there some of its commands are disregarded.

## § 4

Strictly speaking, there is not one International Law, but several. Wherever peoples are compelled by local contiguity or other circumstances to enter into relations with one another, a set of rules and customs is sure to grow up and their intercourse will be regulated thereby. The rules will differ at different times and among different groups. Their nature will be determined by the ideas current upon the subject of international intercourse and the practices permissible in warfare. In these matters the notions of classical antiquity differed immensely from those of the modern world; and in our own day there is a great gulf fixed between the views of civilized Europeans and Americans on the one hand, and those of backward and barbarous peoples on the other. But though there are several systems of International Law, there is but one important system, and to it the name

International Law applies to civilized states only, though it is not confined to Christian states.

has been by common consent appropriated. It grew up in Christian Europe, though some of its roots may be traced back to ancient Greece and ancient Rome. It has been adopted in modern times by all the civilized states of the earth. The nations of the American continent are bound by it no less than the powers of Europe; while among the Asiatic states Japan not only observes it carefully, but takes an active part in its development. We have, therefore, in our definition, referred to it as "the rules which determine the conduct of the general body of *civilized* states."

§ 5

International Law regulates the conduct of states in their mutual dealings, hostile as well as pacific.

We have spoken hitherto of the mutual intercourse of states and the rules for dealing with it. But a great part of International Law consists of rules for carrying on war, and war cannot with propriety be termed international intercourse. Yet if it is not intercourse it arises out of intercourse; for if states could live an isolated life, though they would never be friendly, they would also never quarrel. Moreover, civilized states have in the course of ages come to adopt, and in large measure to keep, a number of most important rules for determining their conduct when at war, both towards the enemy and towards other powers not involved in the quarrel; and the latter, who are termed neutral, have also to observe special rules with regard to the belligerents. All these rules are parts of International Law; for they guide the conduct of states in their relations with one another. We have endeavored to include them in our definition, along with the rules of ordinary pacific intercourse, under the comprehensive phrase, "rules which determine the conduct of the general body of civilized states in their *dealings* with one another."

§ 6

Matters belonging to the sphere of external activity are generally carried on between state and state, or, to speak with absolute precision, between government and government. But there is a large number of cases in which external

matters have to be settled between the government of one state, acting through its authorized agents, and private individuals belonging to another state. Thus, if in time of war a subject of a neutral state attempts to carry to one of the belligerents articles useful chiefly for warlike purposes, such as arms and ammunition, the other belligerent may stop him on the high seas or in belligerent territory, and confiscate all the goods in question, after trial and sentence in what is called a Prize Court of the captor's country. Again, if a man makes a contract in one state to be performed in another, or becomes bankrupt in one state having property and creditors in another, a foreign tribunal may have to deal with him and decide what law it shall apply to his case. These are but illustrations; yet it is clear from them that between the first and second of the cases indicated there is a great difference. The neutral individual whose contraband cargo is confiscated suffers under a rule to which his government has given express or tacit consent, and if any other rule is applied his state will at once protest and demand compensation for the injury done to her subject. It is only the *procedure* which applies in the first instance to a private person. The *rules* are international in the strictest sense. On the other hand the private person who finds that a court of a foreign state has adjudicated upon his case by applying to it a rule of law unlike his own will invoke in vain the aid of his government to secure for him a different decision. He will be told that there are no received international rules dealing with these matters of private right. In regard to them each state can act as it pleases through its tribunals, as long as it does not perpetrate upon subjects of other states continuous and flagrant injustice. The rules and principles adopted by the tribunals are sometimes called Private International Law; but the title is a misnomer, for they are not international in any true sense.[1] In time, however, they may become so; for the courts of civilized states are coming more and more into

International Law includes the rules of maritime capture, but not the rules for determining which of two conflicting systems of law shall prevail in matters of private right.

[1] Holland, *Jurisprudence*, pp. 422–424; Pollock, *First Book of Jurisprudence*, p. 99. Oppenheim, *International Law*, vol. I, § 1.

harmony with regard to them, and what is called the Conflict of Laws is being brought to an end by means of a tacit agreement as to what law shall prevail in each kind of case. Moreover, important bodies, such as the *Institut de Droit International*, are seeking to solve difficulties by elaborating rules and recommending states to embody them in international treaties.[1] The Berne Convention of 1886 [revised in 1908] on the subject of copyright may be cited as an example of what is aimed at. [Upwards of sixteen] countries, including Great Britain, are parties to this agreement. The United States, which has not signed it, has copyright treaties with the principal European powers. If bodies of rules on this and other matters of private right should come to be accepted by all civilized powers, they would thereby acquire the character of true International Law.

§ 7

The history of the names given to the science.

The name *International Law* is much more modern than the system to which it is applied. Facts and theories as to the origin and basis of our science have been reflected in its nomenclature. A great number of its precepts and many of its diplomatic forms were derived from Roman Law, directly by civilians or indirectly by canonists, and accordingly it was sometimes entitled *Civil Law* (Jus Civile). Bishop Ridley, as Visitor of the University of Cambridge in the reign of Edward VI, declared in a speech to that learned body, "We are sure you are not ignorant how necessary a study of Civil Law is to all treaties with foreign princes and strangers."[2] And about a century and a half afterwards Locke[3] wrote this quaint and significant passage: "A virtuous and well-behaved young man, who is well versed in the general part of the Civil Law (which concerns not the chicane of private cases, but the affairs and intercourse of civilized nations in general, grounded upon principles of reason), understands Latin well, and can write a good hand,

[1] *Annuaire de l'Institut de Droit International*, 1902, 1904, 1906, 1908.

[2] Nys, *L'Histoire Littéraire et Dogmatique du Droit International en Angleterre*, p. 27.

[3] *On Education*, § 175.

one may turn loose into the world with great assurance that he will find employment and esteem everywhere." Meanwhile other influences had made themselves felt. The Puritan idea that the Bible contained a complete code of conduct applicable to all possible conditions caused such works to be written as Richard Bernard's *The Bible battels, or the sacred art military; for the rightly wageing of warre according to the Holy Writ.* This was published in 1629, four years after the epoch-making work of Hugo Grotius, *De Jure Belli ac Pacis*, had appeared at Paris. Pufendorff, the great disciple of Grotius, published in 1672 his *De Jure Naturae et Gentium*, the title of which bore witness to the influence exercised on our subject by the theory of a Law and State of Nature. Similar evidence is afforded by the names bestowed upon their works by many of the great publicists of the eighteenth century. The phrase *Law of Nations* was generally used by them to indicate the international code. Its capital defect as a name was the mistaken belief that it exactly translated the Latin *Jus Gentium*, which lent color to the erroneous fancy that a large and important department of the law of ancient Rome was concerned with the mutual rights and duties of independent states. The great English jurist, Jeremy Bentham, put an end to the difficulty by coining, in 1780, the phrase *International Law*.[1] It was a translation of part of the title of a work by Dr. Zouch, who was Judge of the English Court of Admiralty in the reign of Charles I and author of a book entitled *De Jure Feciali, sive Judicio inter Gentes.* The phrase *Judicium inter Gentes*, anglicized into *International Law* and adopted into French and German as *Le Droit International* and *Das Völkerrecht* respectively, sets forth with brevity and clearness the character of our science as the system of rules held to be binding between the members of the great society of civilized powers. But unfortunately it obscures the fact that the members of this society are the political communities we call states, not the groups united by ethnological and other ties to which we give the name of nations. In our chapter on the Subjects of International Law we shall set forth the difference between

[1] *Principles of Morals and Legislation*, ch. XVII, § XXV.

them. Here it is sufficient to point out that when the state and the nation do not coincide, International Law deals with the former and not the latter.

§ 8

The two problems: (1) Is International Law really law? (2) Are its principles and rules derived from intuition or experience?

In discussing the nature of our science, we find ourselves confronted by two great questions. We have first to consider whether International Law is, properly speaking, law at all. And in the second place, we must settle for ourselves the problem of the origin and essential character of the rules we study. Can they be deduced from principles of universal authority, which every man of sense discovers for himself by the exercise of his reason, but which exist independently of human arrangements and human rules? Or must they be generalized from the practice of states in their dealings with one another? In other words, are the methods of International Law transcendental and *a priori*, or are they historical, inductive, and classificatory? We will deal with these two questions in the order in which we have stated them.

§ 9

Is International Law really law?

As to the first question, there are many rules of international conduct which the general opinion of civilized mankind approves.[1] They are enforced partly by a conscientious conviction that they are good and right, partly by those subtle influences which make it difficult for a man or a body of men to act in defiance of the strongly held views of those with whom they habitually associate, partly by a fear lest disregard of them should in the long run bring evil on the recalcitrant. These rules, though like other rules they are sometimes evaded and sometimes defied, do, nevertheless, receive general obedience; they are no more reduced to a nullity by being sometimes broken than are the laws of the land because some habitual criminal disregards them with impunity every day. We may therefore term them laws, unless we follow Austin[1] in his developments of that analysis of

[1] Lawrence, *International Problems and Hague Conferences*, pp. 4–7.

[2] *Lectures on Jurisprudence*, lect. VI.

sovereignty which may be traced back at least as far as Jean Bodin,[1] the great French political thinker of the sixteenth century, and even further still to mediaeval canonists anxious for the aggrandizement of papal power.[2] If no one is lawgiver who cannot bring a definite and foreordained evil to bear on the disobedient, and nothing is law which does not rest in the last resort on superior force, then indeed it is impossible to discover in the social code of civilized states many precepts which we can dignify by that exalted title. But if we are content with the definition of Richard Hooker, the great Elizabethan divine, who spoke of law as "any kind of rule or canon whereby actions are framed,"[3] we may apply the term to those regulations concerning international conduct which meet with general acceptance among civilized communities. Here and there we find divergent views embodied in conflicting proposals. Moreover, when new cases arise, as they must in a society which is living and growing, the manufacture of legal clothing to fit them takes a considerable time and gives rise to much discussion. But the rules, for the most part, are clear and definite; and habitual obedience is secured for them, though by moral more often than by material force. A reasonable uniformity of conduct is thus produced among those to whom the rules are set, that is to say, the organized governments of the civilized portion of the human race. The application of the term *International Law* to the provisions of their social code is justified by the usage of more than a century; and, though the phrase is open to the objection urged at the end of § 7, there seems no sufficient reason for discarding it, and searching for a new one. Indeed, we shall speak not only of International Law, but of International Morality also, meaning by the former phrase rules which states have expressly or tacitly consented to observe, and by the latter rules which in our view they ought to observe. Thus in passing judgment upon the conduct of a state on a given occasion, we

[1] *De la République.*

[2] Figgis, *From Gerson to Grotius*, pp. 143–145; Maitland, *Political Theories of the Middle Ages* (translated from Gierke), pp. 82–100.

[3] *Ecclesiastical Polity*, bk. I, ch. III, i.

shall be able to say it was both legal and moral, or it was legal but not moral, or it was moral but not legal, or it was neither moral nor legal. And, as if there was not in these statements a sufficient wealth of alternatives, the writings of publicists provide us with yet another. They speak of the *Comity of Nations*, meaning thereby those rules of courtesy, the benefit of which states sometimes accord to one another, though not bound to do so by the accepted international code. We have to add, therefore, to International Law and International Morality, International Comity also. A state act may be legal, moral, courteous, or any combination of these three.

## § 10

Does International Law proceed by the *a priori* or by the historical method?

The next subject to be discussed is far more important. It matters very little whether we call International Law by that name, or by one somewhat different, as long as both names signify the same thing; but it matters a great deal whether we regard it as an *a priori* inquiry into what the rules of international intercourse ought to be or an historical investigation of what they are. Many books on the subject proceed upon the assumption that it is possible by reasoning from certain general principles, which are assumed rather than proved, to discover a number of absolute rights possessed by states in virtue of their independent existence.[1] International Law, it is asserted, recognizes these rights, but does not create them, since they are antecedent to all law, or at any rate to all law of human imposition. But the writers who reason thus proceed to fill up all the details of their systems by referring to the conduct of states in circumstances which have actually occurred. They thus save themselves from the reproach of evolving their International Law from their own inner consciousness, but only by disregarding through the greater part of their works the principles set forth in the opening chapters. Those who treat the subject in this manner cannot be

[1] Cf. Wheaton, *Elements of International Law*, § 60; Hautefeuille, *Droit des Nations Neutres*, Discours Préliminaire, pp. 6–12.

expected to distinguish between the intuitional and the inductive method. But it is impossible to avoid confusion unless we decide between them; and in order to bring about a decision, it will be useful to ask one or two simple questions. Do states refer in their controversies with one another to innate ideas of justice, or to principles accepted by general opinion? Do they appeal to precepts deduced from the consideration of absolute rights antecedent to custom and law, or to rules which can be shown to have been adopted in similar circumstances by all or most states? A slight acquaintance with the history of international transactions will show that the latter alternative is the one adopted with something approaching to unanimity. Statesmen uphold a cause for which they are contending by reference to acknowledged rules deduced from general practice. If there are no precedents exactly applicable to the matter in hand, they endeavor to show that admitted principles, logically developed, lead to the conclusions they wish to establish. Very seldom do we find nothing but appeals to natural right, or innate principles of justice and humanity. Sometimes such references are used to clinch an argument otherwise well driven home, but more often they bolster up a case for which little support can be found elsewhere. Their presence alone in a state paper is a pretty sure sign that International Law is hopelessly against the contentions of its authors. It is safe to assert that whenever it is possible diplomatists base their arguments on usage, and, if usage is doubtful, on principles which have been adopted by great groups of civilized powers.

Now if those who have to conduct the external affairs of states appeal in controversies with other states, not to such ideas of justice as most commend themselves at the time to the parties concerned but, to a previously determined body of rules, we may feel sure that the mutual intercourse of states is governed by these rules, and that they are the subject-matter of International Law. Its students, therefore, are primarily inquirers into what is, not into what ought to be. And their method must of necessity be historical, since the only recognized means of discovering what rules apply to particular cases in the present takes the form of an inquiry into the his-

tory of similar cases in the past. The rules, and the principles on which they rest, may be morally good or morally bad. We may approve them, or we may disapprove. But if they determine the conduct of governments in relation to one another, if they define the rights and set forth the obligations of states, they are International Law.

§ 11

The place of ethical considerations in International Law.

But while we hold those rules to be International Law which states do actually observe, without regard to their goodness or badness, we do not imagine that the moral quality of these rules is a matter of indifference, or believe that writers on public law need not trouble themselves about it. All we contend for is that the question what are the rules of International Law on a given subject, and the question whether they are good or bad, should be kept distinct. They differ in their nature and in their method of solution; and nothing but harm can come of any attempt to unite them. Yet it is often the duty of jurists to put ethical considerations prominently forward. Even in a book on some portion of ordinary Municipal Law, we should expect to find expressions of opinion upon various rules, the justice of which was disputed among those competent to form a judgment. And if no reasonable objection can be taken to such a course, it cannot be doubted that the publicist is justified in suggesting, on moral grounds, alterations in International Law where he deems it open to objection, provided always that he does not proceed to regard as law the new rule he has suggested, because he believes he has proved it to be much superior to the old. But in addition to cases of change and reform, there are other cases which must be dealt with on ethical grounds. If a point of Municipal Law is doubtful, men resort to a supreme court for a decision, or to a supreme legislature for an interpreting statute; but if a point of International Law is doubtful, they can resort only to general reasoning for a convincing argument, unless, indeed, they settle the question by blows. And International Law in many of its details is peculiarly liable to disputes and doubts, because it is

based on usage and opinion. He who in such a case bases his reasoning on high considerations of morality may succeed in resolving the doubt in accordance with humanity and justice.

§ 12

Summary of results attained in this chapter.

We are now in a condition to sum up the results of a long and somewhat intricate chain of reasoning. Briefly, they are these. The controversy as to whether the term *law* is properly applied to the rules of international conduct is a mere logomachy. If we hold that all laws are commands of superiors, International Law is improperly so called. If we hold that whatever precepts regulate conduct are laws, International Law is properly so called. But since almost all writers apply the term *law* to the rules which guide states in their mutual intercourse, it seems best to adopt it, on the clear understanding that the word is used in the latter sense. International Law proceeds first by the method of inquiry into the practices of states in their dealings with each other, and into the acknowledged principles on which those practices are based. Having discovered what they are, it has next to classify them, derive rules from them, and reduce them to system. Incidentally, however, it deals with the question of what the rules ought to be, whenever a change is felt to be desirable, or a doubt has to be resolved. A writer on International Law, therefore, must cease to rely exclusively upon the method of observation and classification, when he wishes to clear up a doubtful point or bring about a needful reform. For a moment his science ceases to be inductive, and he flies to general reasoning, knowing that if he convinces all concerned to the extent of influencing their conduct, he *ipso facto* resolves the doubt or changes the law. In a sense he himself legislates, for he creates the opinion that is really supreme. And this he does without deserting the positive method and confounding the ideal with the real. A rule may in time become a part of International Law owing to the cogency of his arguments; but he must not say it is law until it has met with general acceptance and been incorporated into the usages of states.

## CHAPTER II

### THE HISTORY OF INTERNATIONAL LAW

§ 13

The history of International Law goes back to ancient Greece and Rome. It may be divided into three periods.

INTERNATIONAL LAW, as we know it, is as a system of rules for the guidance of civilized powers. It sprang up originally in Europe, and extended its authority to states outside European boundaries as they adapted themselves to European civilization. In its fulness it is a growth of modern times. Its leading principles are little more than three hundred years old. But inasmuch as some of its departments —for example, the law of diplomatic immunities—can be traced to much more remote antiquity, it seems best to commence an outline of its development by going back to the Roman Republic and the little city-states of ancient Greece. Starting from these beginnings, we may divide the history of International Law into three periods, during each of which one fundamental idea dominated the minds of men with regard to the external relations of political communities. But there are no strongly marked boundary lines between the periods. Each gradually shades off into its successor during a time of conflict between the old idea and the new. The first two are preparatory. In them we find only the germs of that which attained to vigorous life in the third.

§ 14

The first period extends from the earliest times to the establishment of the universal dominion of Rome under the Cæsars.[1] Its distinguishing mark is the belief that nations owed duties to one another if they were of the same race, but not otherwise. States as such possessed no rights, and were

[1] [Cf. Phillipson, *International Law and Custom of Ancient Greece and Rome.*]

subject to no obligations. The tie of kinship, real or feigned, near or remote, through the father or through the mother, was the basis of all ancient society; and just as it settled the condition of the individual within the state, so it also prescribed and limited the duties of the state to other states. This comes out most clearly in the history of Greece. In the Homeric poems piracy and robbery are accounted honorable, and there is no distinction between a state of war and a state of peace. The persons of heralds were indeed respected, but this seems to have been due to religious feeling quite as much as to any sense of intertribal duty. And the same ferocity which distinguished early society appears to have continued, so far as barbarians were concerned, down to the close of the independent political existence of the states of ancient Greece. Aristotle calmly reasons that nature intended barbarians to be slaves,[1] and among the natural and honorable means of acquiring wealth he classes making war in order to reduce to slavery such of mankind as are intended by nature for it.[2] At a later period still, in the speech of the Macedonian ambassadors urging the Aetolian Council to war with Rome, occurs the passage, "Cum barbaris aeternum omnibus a Graecis bellum est, eritque."[3] This was doubtless merely a rhetorical statement, but the fact that it could be made is significant. When we reflect that by barbarian was meant simply non-Greek, we see at once that the Greeks recognized no duties towards those nations who were not of Hellenic descent. But among themselves they had a rudimentary International Law based upon the idea that all Hellenic peoples, being of the same race and similar religion, were united together by bonds which did not subsist between them and the rest of the world. They were often guilty of acts of ferocious cruelty in their warfare with one another, but nevertheless they recognized such rules as that those who died in battle were to receive burial, that the lives of all who took refuge in the temples of a captured city

In the First Period — from the earliest times to the Roman Empire — states as such had no mutual rights and duties. Kinship was the basis of the relations between Hellenic communities.

[1] *Politics*, bk. I, chs. II, VI. [2] *Ibid.*, bk. I, ch. VIII.
[3] Livy, *History*, bk. XXXI, ch. 29.

were to be spared, and that no molestation was to be offered to Greeks resorting to the public games or to the chief seats of Hellenic worship.[1] When Rhodes became the great naval power of the Aegean, a maritime code arose which was called the Laws of the Rhodians, and was obeyed wherever Greek commerce extended. This code has a curious and important history. From it were derived many of the commercial and marine regulations of the Roman Emperors, and after the revival of commerce vague recollections of imperial laws were among the influences which helped to form the Consolato del Mare, the great maritime code of the Middle Ages, from which part of the modern law of naval capture and many modern commercial regulations are derived.[2]

§ 15

Republican Rome possessed no true International Law.

Among the Romans of the Republic there is perhaps less trace of a true International Law than among the Greeks. Rome stood alone in the world. She was not one of a group of kindred states; and therefore in her dealings with other states she was rarely restrained by any notion of rights possessed by them as against herself. Her *jus feciale*, and the rule which excluded from her armies all who had not taken the *sacramentum*, or military oath, sprang partly from religious feeling and partly from the love of order which so distinguished the ancient Romans. They were in no respect due to any idea that Rome had obligations towards other nations. It was the duty of the Fecials to demand satisfaction from foreign states, and to make solemn declarations of war by dooming the enemy to the infernal gods;[3] but the law which imposed these functions upon them was purely a matter of internal regulation, and by the time of Cicero it had ceased to be strictly observed. The rule about the military oath was enforced for the sake of discipline, not for the protection of the enemy from lawless

[1] Grote, *History of Greece*, part II, ch. ii.

[2] Pardessus, *Us et Coutumes de la Mer*, vol. I, pp. 21–34, 209–260, and vol. II, pp. 1–368.

[3] Livy, *History*, ch. I, 32; Cicero, *De Officiis*, bk. I, ch. ii.

adventurers. Instances may be quoted of the use by Livy and other Roman writers of the phrase *jus gentium* in the sense of usage approved by the mind and conscience of mankind in matters connected with war and negotiation. But the Roman jurists never worked out a true law between nations; and in the main Rome never claimed for herself, nor gave to other states, the benefit of any idea of mutual obligations binding on them as separate international persons.[1]

§ 16

Our second period begins with the establishment of the universal dominion of Rome under the Caesars, and ends with the Reformation. It is characterized by the conception that there was to be found somewhere a common superior who regulated the dealings of ordinary political communities with each other, in addition to keeping peace and order between individuals. For a long time this was not only a great fact, but the most obvious and beneficent fact in the sphere of law and government. The Roman Empire in its palmy days extended over the settled part of Europe, and much of Asia and Africa. Roughly speaking, it coincided with the world of ancient civilization. The policy of its rulers frequently left some remnants of self-government to conquered nations. Thus Caesar was the political superior of a large number of subordinate rulers; and their disputes, whether personal or national, were settled by appeals to him. In these circumstances International Law was really based on the commands of a superior. Its precepts were laws in the strictest Austinian sense.[2] They imposed perfect obligations, and were armed with tremendous sanctions. Universal sovereignty filled men's minds with awe and wonder. The *majestas populi Romani* was an object of religious reverence, and the Roman state itself, incarnate in the person of its Caesar, was worshipped as a god. It stood

In the Second Period — from the Roman Empire to the Reformation — it was deemed that the relations of states must be regulated by a common superior. For a long time the Roman Emperor was such a superior.

[1] Westlake, *Chapters on the Principles of International Law*, pp. 18–25. Article by Professor Nettleship in the *Journal of Philology*, vol. XIII, No. 26.

[2] See § 9.

between the world and anarchy; it protected civilization against barbarism; it united the nations by moral and material bonds; it kept the peace within its boundaries, and held at bay beyond them the savage hordes who longed for the plunder of its rich provincial lands. No wonder, then, that its supremacy was not merely submitted to, but welcomed. Theories were framed about it, and people held that the existence of a common superior over all states was part of the natural order of the universe. Memories of world-wide sway were so deeply graven on the minds of men that, long after Rome had fallen, her conquerors strove to build anew the fabric of her greatness, and their chieftains could think of no alternative to tribal sovereignty but universal dominion.

While the old Roman Empire remained strong, fact and theory with regard to the settlement of disputes between nations coincided with tolerable accuracy. It must not be supposed that the emperors issued among their laws anything like an international code. There was no room for any such body of rules, because the subordinate states could have little foreign policy. Their external activity was exercised chiefly in their dealings with Rome herself. In these they stood rather in the relation of suppliants to a superior than equals treating with an equal on common ground. When dynastic disputes arose, or when one subordinate state complained of ill-treatment from another, an appeal was made to Caesar, and his decision was final. A series of isolated judgments on such cases could give rise to no body of rules by which international conduct could be guided; and, in fact, no such rules are to be found in Roman Law. With regard to outer barbarians, the customs of Roman warfare were terribly severe. Slaughter and rapine were their portion if they resisted; and those who escaped the sword were too often sold into slavery.

§ 17

After the fall of the Western Empire, the theory of a common superior for states still survived. Just as Greece conquered her conquerors by bringing them into subjection to her arts and her philosophy, so Rome amid the ruins of

her material power enslaved the minds of the nations who no longer submitted to her yoke. The spell of her world-wide dominion was not broken by the invasions of Attila and the sack of Genseric. Men held that her dominion was to be eternal, as well as universal. Though Rome was no longer the seat of empire, still the Empire itself was Roman. It must live on, they thought, in some form; and so they cast about to find a power which should be a fit possessor of the world-wide sovereignty no longer centred in the city of the seven hills. At first the only substitute to be found was the decaying Empire of the East, and for many years the Roman world was ruled in name at least, from Constantinople. But in time a more vigorous successor arose; and from the coronation of Charlemagne as emperor by Pope Leo III in the basilica of St. Peter at Rome, on Christmas Day, A.D. 800, the imperial power and the world-wide dominion involved in it were held to have passed to a new line of Frankish sovereigns. The Eastern Empire put forth a feeble protest; but outside its own rapidly diminishing territories, none accepted its claim to universal sovereignty. For many centuries the Romano-German Empire was believed to be a continuation of the old dominion of the Caesars, and theoretically it succeeded to all the powers of its predecessors, with, however, one great difference. It was rather a world-church, with a temporal ruler for the performance of civil functions, than a world-empire with ecclesiastical officers for the performance of religious rites. The personal character of each emperor largely determined the nature and extent of his influence; and gradually the papacy, which had been the chief agent in creating the new or Holy Roman Empire, became its rival in pretensions to universal dominion. The theory of the two vicars of God, closely united as the joint heads of His people on earth, and the two swords, the temporal and the spiritual, wielded respectively by the emperor and the pope, was soon weakened by efforts after supremacy on the part of each of the twin authorities. On the whole, the pope prevailed. The pretended gift by Constantine of all the West to the Roman pontiff, and the very real

The Holy Roman Empire and the papacy claimed universal authority during the Middle Ages.

spiritual supremacy exercised by the successors of St. Peter, formed the base of a claim "to give and to take away empires, kingdoms, princedoms, marquisates, duchies, countships, and the possessions of all men." And this claim was not an idle boast, as was proved in 1077, when the Emperor Henry IV, the most powerful prince in Christendom, humbled himself at Canossa before the great Pope Gregory VII.[1]

§ 18

The idea of a common superior died out at the Reformation.

Till there were nations, in the sense of independent political communities possessed of sovereign power, there could be no true International Law. Such rudiments of it as existed in the Middle Ages were restrained in their growth, rather than assisted, by the claims of the pope and the emperor. As regards other governors, these two supreme authorities were judges and arbitrators, not lawgivers. Nothing in the shape of an international code was promulgated by them, though they constantly decided particular cases. Their power was slowly undermined, first by their quarrels, and then by other influences. The corruption of the Roman *curia*, the diminution of the empire in extent and prestige, the rising feeling of nationality, and the revival of learning, helped to weaken the majestic fabric of the mediaeval theory. It fell with a crash when, in the storm of the Reformation, the two powers which, according to it, should have calmed the strife were obliged to join in the turmoil. The pope opposed the reformers, and the emperor took the same side. Protestant theologians poured scorn on papal claims; Protestant jurists challenged imperial authority; and the Protestant princes of what was now the German empire were often in arms against the emperor. His authority was thus set at naught within the limits of his own dominions, and outside he had long received nothing more than mere honorary precedence as the first potentate in Christendom. Practically the notion of a common superior over states had long been obsolete, and when the attack on it was

[1] Bryce, *Holy Roman Empire*, chs. IV, V, VII, X, XII; Emerton, *Mediæval Europe*, ch. VIII.

joined by Jesuit divines it soon ceased to have even a theoretical existence.[1]

§ 19

New principles were required unless states were openly to avow that in their mutual dealings they recognized no law but the right of the strongest or the most subtle. For a time there was a great reaction towards this view. In 1513 Machiavelli set forth in *The Prince* the doctrine that in matters of state ordinary moral rules did not apply, and his work soon became the political manual of the rulers and generals of the time. But fortunately for humanity, the tendency towards lawlessness in international transactions was arrested by the publication in 1625 of the great work of Grotius, *De Jure Belli ac Pacis*. In this book new ideas which had been floating about in the atmosphere of European thought for a century or more were clearly stated, systematically arranged, and logically applied to the regulation of the mutual dealings of states.[2] Weary of anarchy, Europe looked with relief on a system which promised to put some curb on the fierce passions of rough warriors and the duplicity of polished statesmen. Thus a real International Law took the place of the shadowy system which had existed in the Middle Ages, and new principles became the foundation of a strong and enduring fabric. They belong to our third period; but before we inquire what they were and how they were applied, it will be well to state very briefly the nature of various forces which helped to mould the mediaeval order, and survived, sometimes in an altered form, to influence the modern world.

For a time there was grave danger of utter lawlessness in international affairs.

§ 20

As the Roman Empire fell, the advancing tide of barbarian invasion swept away the bulwarks of civilization. Commerce disappeared; warfare was restrained by no rules; pirates swept the seas. But a new and better order slowly emerged

[1] Figgis, *From Gerson to Grotius*, lects. III and IV.

[2] *Ibid.*, lects. III and VII.

from the chaos. Christian morality softened the manners and mitigated the cruelty of the barbarian nations as one by one they entered the fold of the Church. The study of Roman Law gave a magazine of new ideas and rules to statesmen and lawyers, while the growth of the Canon Law, which was largely founded on it, supplied a system of precepts for the settlement of great moral questions as well as purely ecclesiastical affairs. The slow revival of commerce produced various codes of maritime law. The most famous were the Laws of Oléron, which ruled the sea-traffic of the Atlantic coasts of Western Europe, the Leges Wisbuenses, which obtained currency in the North Sea and the Baltic, and the Consolato del Mare, which regulated the commerce of the Mediterranean. Of these codes the last was the most important, and it was also the only one that dealt with capture at sea in time of war. The earliest extant printed edition was published at Barcelona in 1494; but the more ancient rules in it were drawn up in the same place in the middle of the previous century, and even then they did but set forth older custom.[1]

Influences which made for improvement during the Middle Ages.

The influence of the Maritime codes, great though it was, cannot be compared in importance with that of feudalism, the system which associated the existence of political rights and duties with the possession of land, though the nature and extent of them were determined by contract. This being the case, it was an easy inference that the ruler must have far greater rights over the land than his subjects, since his political functions were far more important than theirs. Thus, from being lord of his people, he became lord of his people's lands; and from that moment the idea of territorial sovereignty existed in germ, though its growth was restrained by the ease with which feudal notions lent themselves to the doctrine of universal dominion. Feudalism organized society in a pyramidal form. At the base were the cultivators of the soil. Next came the mesne lords, above them the tenants-in-chief, and

[1] For a brief account of these codes, see Sir Travers Twiss in the *Encyclopædia Britannica*, eleventh ed., vol. VII (*Consulate of Sea*), and vol. XXIV (*Sea Laws*). Pardessus gives the codes in his *Collection des Lois Maritimes*.

above them the king. But as there were many kings and princes in Christendom, it was easy to go a step farther, and place at the apex of the pyramid one supreme ruler, who was to be lord over all the rest. Throughout the greater part of Europe this supremacy in things temporal was conceded, as we have already seen, to the head of the Holy Roman Empire, though certain outlying realms claimed entire independence, and some of the stronger English kings insisted on the imperial character of their own royalty.[1] But when the direct power of the emperors became limited to Germany, their theoretical supremacy over other lands had little practical effect; and at the same time they had to struggle without much success against the attempts of the papacy to subject them to its authority. One result of the conflict was the gradual decay of the mediaeval order in the political sphere, till at last, under the influence of the Reformation and the Renaissance, the emperor lost even the speculative acknowledgment of his universal sway, and a number of the more civilized nations of Europe revolted against the claim of the pope to any kind of supremacy. At the same time, feudalism fell into utter decay. But its offshoot, territorial sovereignty, grew stronger than ever. Not only were the obstacles to its progress which arose from universal dominion removed, but the fresh impetus given by the Renaissance to the study of Roman Law rendered it almost natural for jurists and statesmen to look upon the monarchical rulers who now acquired full sovereignty over their respective realms as so many Roman proprietors, with absolute, not limited, ownership over their territories. Thus out of the chrysalis of the old order the new was preparing to emerge. It was to come forth small and weak at first, but possessed of elements of strength which would soon urge it into vigorous growth. It drew much from Roman Law, and something from Canon Law. Territorial sovereignty was the very essence of its being, and Christian morality nourished it. Some rules it found already in existence, especially in the departments of diplomacy and warfare. But though the system of permanent embassies was

[1] Bryce, *Holy Roman Empire*, ch. XII; Freeman, *Norman Conquest*, vol. I, Note C.

superseding the old plan of sending special envoys when some particular piece of business required attention, and a law of capture at sea in time of war was growing up, no developed code existed, even in the books of speculative writers, and the scanty rules that could be found were often crude and generally incomplete. The time was ripe for a great reformer who would combine all the scattered elements of strength which we have seen to exist, and bind them together by means of some principle which would be generally accepted by the thinkers of his day and generation. He came at last after a century of confusion in the person of Hugo Grotius.

§ 21

We now reach our third period, which extends from the Reformation to the present time. Here at last we obtain a true International Law, based on the principle that states are separate and independent members in a great society controlled by no common superior, yet nevertheless not lawless, but governed by rules of conduct binding on all its members. We must not, however, imagine that this idea at once took the place of the crumbling mediaeval theory. Machiavelli died in 1527; but his doctrines did not die with him. Throughout the century which followed, they held the field. All over Europe rulers, emancipated from former restraints and flushed with a new sense of unlimited power, eagerly accepted the political philosophy which taught that cool calculation and enlightened self-interest were the only guides in matters of state policy. The wars of the period were infamous orgies of cruelty, lust, and destruction.[1] In time the world grew weary of the horrors which sprang from the general application of the principles of Machiavelli to negotiations and campaigns, and was disposed to listen when a few isolated thinkers ventured to assert that there were ethical rules applicable to the intercourse of states, though no earthly authority had power to enforce obedience to their commands.

In the THIRD PERIOD — from the Reformation to the present time — the ruling principle is that states are units in a great society, the members of which have mutual rights and obligations.

[1] Lawrence, *Essays on Modern International Law*, Essay IV.

These forerunners of Grotius began to appear towards the close of the sixteenth century. They came from various countries, and they took opposite sides in the great religious and political struggles of the period; but they were all alike in this, that they believed in what they called a law of nature. Three of them are so important that it is necessary to call special attention to their works. First came Balthazar Ayala, who was what we should call judge-advocate-general of the Prince of Parma's army in the Netherlands. In 1582 he published at Douai his *De Jure et Officiis Bellicis*. In it he attacks the doctrine that war knows no law, and argues in favor of a *jus naturale*, and also a *jus gentium* established by common consent. Next to him in chronological order came Albericus Gentilis, a doctor of civil law, who left Italy in consequence of his Protestant opinions, and in 1580 came to Oxford, where he made a great reputation by his lectures, and became professor of civil law in 1587. His great work was *De Jure Belli Libri Tres*, published in 1598. He, too, maintained that there was a law of war which he based on natural reason and consent. In the orderly disposition of his subject he was superior to his predecessors. Grotius himself drew largely from him, and acknowledged his obligations, even while criticising style and arrangement, and commenting on what he deemed omissions.[1] The last of the three was Francisco Suarez, a Spanish Jesuit who held the post of professor of theology in the University of Coimbra. There, in 1612, he published his *Tractatus de Legibus et Deo Legislatore*. In it he frankly recognized the separation of states, but insisted on the moral unity of mankind. Hence, he argued, there must be a society of states, and a law for it supplied by natural reason and general custom, yet, like all other laws, dependent on God in the last resort.[2] We see from this brief summary that, in spite of great differences in detail, there was an underlying agreement in fundamentals among the writers to whose works we have alluded. What is true of them is true of others of the

[1] *De Jure Belli ac Pacis*, Prolegomena, § 38.

[2] Figgis, *From Gerson to Grotius*, lect. VI; Westlake, *Chapters on International Law*, chs. II, III

same period whose obscure labors are being gradually revealed to the modern world by the researches of painstaking scholars. They gained recognition in the domain of thought. But it was reserved for Grotius to combine their principles into a system which was so acceptable to the mind of Europe that thought was transmuted into action, and a new and better international order arose on the ruins of the discredited mediaeval system.

§ 22

Huig van Groot, commonly called Hugo Grotius, was born at Delft, in the province of Holland, on April 10, 1583. He grew up amid the soul-stirring scenes of the long struggle of his countrymen with Spain on behalf of their religion, their local liberties, and their national independence. Scarcely had he reached manhood when he won fame for himself as a scholar and a jurist, and was raised to public office. Distinction in the field of authorship came to him at an early period; and the encyclopaedic character of his learning is shown by the great variety of subjects he handled. He wrote well and effectively on theology, history, the classics, jurisprudence, and contemporary politics. He even produced poetry in the Flemish vernacular. Before he reached the prime of life, the part he took in civil disputes led to his arrest in 1618 by order of Prince Maurice of Nassau and the States-general. He was condemned to perpetual imprisonment. But, by the aid of his devoted wife, he escaped in 1621 from his place of confinement, in a box which was supposed to contain the books he had borrowed from his friends. After many adventures he reached Paris, where he lived for a time in great poverty, on a pension granted to him by the French king, but very irregularly paid. In 1635 he entered into the diplomatic service of Queen Christina of Sweden, and became her ambassador at Paris. He was recalled in 1645. A visit to Stockholm was the next event in his career, and it was followed by a voyage, in the course of which he suffered shipwreck. Though he reached land in safety, the cold and exposure undermined his strength, and he died at Rostock on August 29, 1645.

The career of Grotius, the great agent in effecting this change in ideas.

The work on which rests the claim of Grotius to the veneration of mankind is his *De Jure Belli ac Pacis*. It was published in Paris in 1625, when his poverty was so great that he could with difficulty find the necessaries of life for his children. His reward as author was two hundred copies, some of which he was able to sell; but it is said that the money he thus obtained did not suffice even to pay the expenses he had incurred. The book, however, attracted attention immediately among the learned, and very soon became a power among statesmen and thinkers. Gustavus Adolphus carried a copy about with him on his campaigns. In the Peace of Westphalia its leading principles were recognized, and became the foundations of the new public order of Europe, which dates from the great settlement of 1648. And when learning began to revive after the awful ravages of the Thirty Years' War, the Grotian system was taught as public law in the University of Heidelberg.

§ 23

How was it possible for a poor scholar, exiled from his native land, and neglected in the country of his adoption, to give a new direction to the ideas of Western Europe in a most important department of human thought? The answer to this question is threefold. In the first place, the evils due to the banishment of morality from international concerns had become so foul that they stank in the nostrils of all but the vilest of mankind. The very cause which impelled Grotius to write impelled men to heed his words. He says in an often quoted passage, "I saw prevailing throughout the Christian world a license in making war of which even barbarous nations would have been ashamed. Recourse was had to arms for slight reasons or no reason; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were thenceforth authorized to commit all crimes without restraint." [1] When his book was published, the worst horrors of the Thirty Years' War had not taken place. The sack of Magdeburg, the tortures, the profanities, the devastations, the cannibalism, which turned the

Causes of the influence exercised by Grotius.

[1] *De Jure Belli ac Pacis*, Prolegomena, § 28.

most fertile part of Germany into a desert, were yet to horrify the world. But all this followed in a few years; and men who had lived through a whole generation of warfare fitter for Iroquois braves than Christian warriors were glad to listen when one of the greatest scholars and jurists of the age told them there was a law that curbed the ferocity of soldiers and bade statesmen follow the paths of honor and justice. Secondly, Grotius brought to the performance of his great task all the resources of a most acute intellect and a most marvellous erudition. As a scholar he was uncritical, like all the scholars of the early seventeenth century, but the range of his learning was enormous. He piled precedent on precedent, and gathered instances from all history, sacred and profane. We have been brought up under the influence of the doctrine of development, and it is not difficult for us to see that he might with advantage have weighed his authorities more carefully and rejected many of the earlier and more barbarous ones. But we must not forget that he digested his vast mass of matter into an intelligible system, and gave it to the world in a form that attracted men of action as well as students and thinkers. Thirdly, Grotius was in a very true sense the heir of the Middle Ages. Though his system substituted for the world-church, which was also the world-empire, an order based on wholly different considerations, entirely alien to the mediaeval mind, what he completely and finally destroyed was already discredited, whereas he used for constructive purposes many of the materials that had been regarded with approval and respect by the best minds of the preceding epoch. The schoolmen and the canonists reverenced Roman Law. Grotius drew from it whole categories of international rules. The feudal lawyers connected political power and land. Grotius regarded sovereignty as territorial. Theologians, jurists, and philosophers had for centuries appealed to a law of nature. Grotius maintained that it regulated the intercourse of states. The secret of his success lies in his conservative use of approved ingredients. But out of them he compounded a radical remedy for an evil acknowledged to be unbearable.

§ 24

There can be no doubt that the theory of a law of nature was the most powerful influence in winning acceptance for the true International Law which took the place of the occasional and often disregarded decisions of a shadowy universal sovereign. When for the world-state which had ceased to control even the Germanic realms was substituted a large number of territorial states becoming more independent every day, either they must live like wild beasts without law, or some principle must be found which could be made to supply them with laws in the absence of a common superior. Grotius proclaimed that the latter alternative was the only one fitted for human beings. That society, he argued, which includes all mankind cannot exist without the recognition of mutual rights. Rights common to all must be conferred by something wider in its scope than the statutes and ordinances of a particular state. They are derived from natural law, which is "the dictate of right reason, indicating that any act, from its agreement or disagreement with the rational nature, has in it a moral turpitude or a moral necessity." This law is immutable. God Himself cannot change it, any more than He can make twice two to be other than four. Its precepts command what is just, and therefore have God's approval. In that sense they may be considered as divine law, but in no other. Positive divine law, properly so called, is instituted by God, and what it commands is just because He commands it. Natural law is independent of institution, human or divine. It recognizes the inherent qualities of actions as good or bad. Its principles, "if you attend to them rightly, are of themselves patent and evident, almost in the same way as things which are perceived by the external senses." They apply to states as well as to individuals; for the same right reason that shows a man, when he reflects, what is in accord with his rational and social nature, also gives similar knowledge to nations and their rulers.[1]

The law of nature as conceived by Grotius.

[1] Grotius, *De Jure Belli ac Pacis*, Prolegomena, §§ 30, 39, and bk. I, ch. I, 10, 12, 14, 15, 17.

§ 25

It is easy for us, who have entered into the labors of Bentham and the modern school of analytical jurists, to criticise this theory. We can see at once that it confuses what is with what ought to be. In it the real and the ideal are blended to the detriment of both. We regard law as a definite and positive rule of action which is observed among men in a greater or less degree, and enforced by appropriate means. It is an institution, and like other institutions it may be criticised and altered. We speak of good laws and bad laws, thus testifying to our belief that there is a standard of right and wrong apart from law and above law. Yet it is this standard which Grotius called natural law, and by so doing introduced confusion into his reasoning. For, since we apply moral judgment to law, the law which is judged cannot be the same as the standard by which we judge it. It is law because it is a rule of conduct laid down and received among men, not because it embodies justice in its commands. We understand, and indeed assert, that law is not good unless it does this; but we add that, even if it does not, it remains law until it is replaced by some other and, it is to be hoped, better rule. Grotius failed to make this distinction between fact and aspiration, and in consequence involved himself in serious contradictions. Hardly had he likened the process whereby man is supposed to discover natural law to sense-perception, before we find him limiting those who are capable of discovering it to the more civilized nations, and ruling out the more savage; whereas, not only do savages possess senses, but their senses are generally more acute than those of civilized men.[1] When he is reasoning from his own conception of the rational and social nature of man, the law of nature is high and holy.[2] When he is making deductions from the opinions and practices of mankind, it authorizes slavery and does not condemn polygamy.[3] In his survey of ancient history he sees a vast number of divergent customs,

The theory of a law of nature criticised.

[1] *De Jure Belli ac Pacis*, Prolegomena, § 39, and bk. I, ch. I, 12.
[2] *Ibid.*, bk. I, ch. I, 10. [3] *Ibid.*, bk. II, ch. V, 9, 27.

and is reduced to all sorts of shifts and subtleties to reconcile their variety, and the cruel and abominable character of some of them, with his own doctrine of the immutability of natural law, and the perception by every unsophisticated human intelligence of the intrinsic qualities of actions as good or bad. If his view were correct, there would always have been a general agreement as to the fundamental principles and more important precepts of the law of nature. But nothing of the kind has ever existed. Jurists and philosophers have differed hopelessly among themselves, while the great mass of mankind have not even pretended to understand the matter.

The theory of a law of nature will not bear analysis. Nor is it helped by the further theory of a state of nature, which was held along with it by Pufendorff[1] and Vattel,[2] and other successors of Grotius. They believed that in the infancy of the human race each individual was free to do what was right in his own eyes, since men had no government over them to set them laws. In this condition they obeyed the dictates of nature, that is to say, they observed a few just and simple rules discovered by their own unassisted reason. States, having no common superior, were in the same condition as men before the establishment of political society, and were therefore bound to regulate their conduct towards one another by the law of nature. These statements are wholly unhistorical. There never was a time when each man lived his own individual life, without connection with his fellows, and without feeling the yoke of any external authority. The more we are able to discover about the facts of primitive society, the more clear does it become that primeval man was subject to numerous and galling restrictions in every department of life. Custom and superstition environed him like an atmosphere. He could not escape from their pressure, and he had no wish to do so. The picture of the primitive savage as a being absolutely free to follow his own impulses and determine his own lot is historically false, just as the picture of him as an individual endowed with lofty sentiments, and exercising a calm and passionless

[1] *De Jure Naturae et Gentium*, bk. II, ch. II.

[2] *Droit des Gens*, Préliminaires, §§ 4–12.

reason to discover the best rules of human conduct, is psychologically foolish.

§ 26

Its effect in obtaining acceptance for an improved International Law.

But untenable as is the theory of a law of nature, whether or no it be linked with the twin theory of a state of nature, it performed a great service to humanity when it induced the statesmen and rulers of the seventeenth century to accept the system of International Law put forth by Hugo Grotius. They had all been taught that natural law was specially binding in its character, and believed that men could not violate it without sinking to the level of the beasts. When they found it applied by a great thinker to the regulation of international relations, and discovered that, so applied, it forbade the practices of which they were more than half ashamed, and placed restraints upon that unchecked fury which had turned central Europe into a veritable pandemonium, they were disposed to welcome and adopt it. The times were out of joint. The old principles which had regulated the state relations of mediæval Christendom were dead. The attempt to get on without any principles at all had been a costly and blood-stained failure. New principles were presented, clothed with all the authority of admitted theory. It is not to be wondered at that they were eagerly received, and became in a short time the foundations of a new international order. In so far as they were theoretical, and connected with nature and natural law, we have examined them and found them to be indefensible. But, as we have just seen, their immediate practical effect was beneficial in the highest degree.

§ 27

Fortunately, the Grotian system did not collapse when the theory of a state and a law of nature lost credit. Its own excellence, and the good work it was doing in the world would in all probability have preserved it from such a fate in any case; but they were powerfully aided by the fact that its author had provided a second support for it in his doctrine of

general consent as a source of law.[1] With natural law, which he held to exist without a law-giving authority, he contrasted positive or instituted law, which proceeded from some external source. This positive law he divided into divine law, civil law, and *jus gentium*, or the law of nations. The first needs no explanation. By civil law Grotius meant the law of a state, set to its people by the proper authority within it. *Jus gentium* he defined as "that law which has received an obligatory force from the will of all nations, or of many." Wide and persistent usage, and the consent of those who made the subject their study, were to him proofs of the will of the society of nations.[2] The rules he could generalize from such instances he regarded as the instituted law of nations, though he strove to mitigate the harshness and ferocity of many of them by restraints (*temperamenta*) based on justice, magnanimity, and Christian charity.[3]

The Grotian system contained a second principle, which supported it when the first failed. Two senses of *jus gentium*.

§ 28

Here it is necessary to point out that the Grotian sense of *jus gentium* is not exactly that in which the great Roman jurists used the phrase. When Gaius defined it as what natural reason establishes among all men (*Quod vero naturalis ratio inter omnes homines constituit*[4]), and Tribonian repeats the definition,[5] they seem to be describing what Grotius meant by natural law. But they both go on to state that the rules prescribed by natural reason are observed by all nations alike, and to divide the laws of the Roman people into a portion peculiar to themselves, called *jus civile*, and a portion common to them and other peoples, called *jus gentium*. Thus the Roman law of nations had two aspects. On one side it appeared as the dictate of enlightened reason, and on the other as the product of common consent, the two being unified by the belief that general agreement could spring from nothing but human nature. We say human nature ad-

Two senses of *jus gentium*.

[1] *De Jure Belli ac Pacis*, Prolegomena, §§ 17, 40.
[2] *Ibid.*, bk. I, ch. I, 14, 15.
[3] *Ibid.*, bk. III, ch. X, *et seq.*
[4] Gaius, bk. I, tit. 1.
[5] Justinian, *Institutes*, bk. I, tit. II, 1.

visedly, because Ulpian failed in his attempt to set up a *jus naturale* apart from the *jus gentium*, by elevating instincts common to men and the brutes into a source of law.[1] Ignoring this theory, the philosophical jurists of ancient Rome identified the *jus naturale* and the *jus gentium*. But Grotius did nothing of the kind. To him natural law was a thing apart, depending for its reception on the enlightenment of human reason, whereas the law of nations derived its binding force from the dictatorship of human will. His *jus gentium* was positive law, instituted by the consent of all nations, or at least the more advanced among them, and applicable to the affairs that arose among them in the society of which they were units. Roman *jus gentium* was a portion of the positive law of the Roman Empire, binding individuals primarily, though not exclusively, and deriving its authority not from the consent of nations considered as political organizations, but from the agreement of civilized and reasonable individuals all over the then known world.[2]

§ 29

The growing recognition of the fact that International Law rests on the consent of nations.

We must not forget that in the great book of Hugo Grotius *jus gentium* stands for a portion only of the rules that he elaborated for the conduct of the affairs of the society of nations. But his successors soon used the phrase for the whole of them, though as time went on they were put to strange shifts in order to reconcile the belief in a sacrosanct and universally obligatory law of nature with their growing perception of the truth that the slowly increasing body of rules which civilized states recognized as binding in their mutual intercourse really rested on general consent. This is shown by the contrast between the views of two of the most influential of these jurists — Samuel Pufendorff, who flourished immediately after Grotius, and Emerich de Vattel, who wrote in the middle of the next century. The former developed and criticised the Grotian system in a series of works published between 1661 and 1694.

[1] *Digest*, I. 1. 1. 3–4.

[2] [Cf. Sir Frederick Pollock in *Law Quarterly Review*, XVIII, 425–428.]

He taught that the law of nations was that part of the law of nature which dealt with the relations of states to one another, and identified the law of nature with the law of God, in so far as the latter was discoverable by reason from the tendency of actions to promote the happiness of society. But he expressly stated his disbelief in any positive or voluntary law of nations, though his recognition of the principle of utility might perhaps be held to have provided a loophole for the introduction of general consent as a source of law.[1] The latter, who published his great book in 1758, taught that the law of nations was discovered by a judicious and rational application of the principles of the law of nature to the affairs and conduct of nations and sovereigns. He adopted the statement of Pufendorff and Hobbes [2] that the law of nations was the law of nature applied to nations. But he went on to explain that, though this was what he called a *necessary* law of nations, always obligatory in the forum of conscience, yet there was in addition a *positive* law of nations, based on their consent, whether presumed, express, or tacit, and this positive and consensual law was to be observed as long as it did not violate the precepts of the natural or necessary law.[3]

Here we get a classification rendered unscientific and obscure by that mixed mode of thought which juggles unconsciously with the word *law*. A law is at one moment a rule generally observed among men, at another a rule the observance of which is deemed highly desirable. What is discerned to be good is deemed to have the same imperative authority as what is ordered to be done. What ought to be is regarded as equivalent to what is. But if we translate the language of Vattel into the terms used by most of the modern English-speaking exponents of the science he helped to build up, it works out somewhat as follows. Certain rules for the guidance of states in their relations with one another have grown up gradually, and meet with general acceptance. Therefore every member of the great society of civilized nations is bound

[1] Pufendorff, *De Jure Naturæ et Gentium*, bk. I, ch. II, 6, and bk. II, ch. III, 20–23.

[2] Hobbes, *De Cive*, ch. xiv, 4.

[3] Vattel, *Droit des Gens*, Préliminaires, §§ 6–9, 27–28.

to obey them, in the same way as every one who belongs to a club is bound to observe its rules, and conform to the etiquette that governs the intercourse of its members. But enlightened reason sees that many improvements might be made in the international code, and even in the nature of the society controlled by it. It thereupon sets up an ideal to be approached, and provides incentives for movement towards it.

Explained and transmuted in this way, the system corresponds to social and moral facts in the sphere of international relations. The ethical standard is the *natural* law of Grotius, the *necessary* law of nations of Vattel. The rules of International Law as we find them at any given moment are the *instituted* law of nations of Grotius, the *positive* law of nations of Vattel. Since the time of the latter writer the distinction we have tried to draw between the ideal and the real has been slowly emerging. The old speculations about the law and the state of nature were first relegated to prefaces and introductory chapters, and then left out altogether, while the principles and rules of the law of nations were drawn with constantly increasing frequency from precedents and agreements. To obviate the difficulties which sometimes arose from the various meanings of *jus gentium*, *droit des gens*, law of nations, the phrase International Law was invented and generally adopted. It is not perfect, as we have seen;[1] but it is a great improvement on its predecessors. Westlake well pointed out that the old endeavor to express by one word or phrase the two notions of what is just and what is instituted is still to be found in the French *droit* and the German *recht*.[2] But the English word *law* is free from this ambiguity, since we use it to signify rules of conduct laid down, enforced, and observed among men, whether or no we deem them just and good. We must take care to keep its meaning clear, though we need to guard with equal care against the error of considering that law is necessarily final. It must always be tried by ethical considerations, and brought up to the ideal standard, which becomes higher and higher with the expansion of man's spiritual and intellectual powers.

[1] See § 7.

[2] Westlake, *International Law*, part 1, pp. 9–11.

§ 30

The theory of a law of nature did enormous service in securing the consent of nations to rules of conduct far more just and merciful than any they would have followed without it. Having attained this end, its work was done; and, as its unhistorical and unphilosophical character became evident, it could be superseded by the principle that International Law rested on general consent, not only without harm but with positive advantage. For while the new theory avoided the confused modes of thought which vitiated its predecessor, by making evident supreme importance of common consent, its supporters emphasized the need of educating general opinion, so that improvements in practice and in the rules based thereon might be demanded from time to time. At first the only kind of general assent that could be shown was tacit. For instance, in the middle of the eighteenth century it became apparent to careful observers that devastation of territory and slaughter of its peaceful inhabitants had occurred very rarely in recent wars between civilized powers, though it had been common enough a hundred years before, during the Thirty Years' War. Accordingly we find Vattel laying down in 1758 the rule that ravaging was forbidden by International Law, unless it was resorted to for the purpose of chastising cruel barbarians like the pirates of Algiers, or protecting one's own territory from invasion.[1] Here we have an instance of a new rule based on what Grotius calls "the will of all nations, or of many." [2] There were, of course, treaties in abundance, and some of them contained rules to which the signatory powers by the mere act of signing gave an express consent. But these rules bound the parties only. They were partial, not general, and therefore could not be considered as part of the law of nations. The age of express consent to general rules was coming, but it had not yet arrived. It was reached when diplomatic acts were negotiated for the purpose of defining and regulating in certain circumstances the conduct of the whole body of civilized states, or at any rate of all who

Growth of the consensual theory.

[1] *Droit des Gens*, bk. III, ch. IX, § 167.

[2] *De Jure Belli ac Pacis*, bk. I, ch. I, 14.

really counted when such circumstances arose. It is a little difficult to determine with absolute exactness the nature of these law-making treaties, as they have been appropriately called.[1] Before that majestic name can be bestowed with full propriety on an international instrument, a certain scope and breadth must characterize its provisions. In one sense any agreement between two powers to act in future towards each other in a certain way may be termed law-making, because it sets a rule to the parties immediately concerned. But it can hardly be proposed to apply such a title to the ordinary bilateral treaties that are made almost every day. At least a group of powers must be affected; and it seems best to say that a diplomatic agreement is not law-making unless it contemplates a general acceptance of its precepts, whether they make new rules or change rules already existing. It is in this sense that the epithet is here used. We will call that a law-making treaty which lays down rules of international conduct meant to be universal in their scope. Before it can bear the name, it must secure observance from the more important of the powers, and aim at securing observance from all. A reasonable time must be given; but if it ultimately fails in gaining the adhesion, express or tacit, of the great majority of civilized states, the mere generality of its purpose will not suffice to raise it to the dignity of an international enactment. For instance, the Treaty of Washington of 1871 cannot be ranked among the law-making treaties, though the contracting powers, Great Britain and the United States of America, agreed not only to observe as between themselves the three rules contained in its sixth article, but also to bring them to the notice of other powers with a view to their general reception. But this has never been done, partly because the two governments were not able to interpret the rules in the same way, and partly because it was known that several important states would decline to accept them.[2] When all the stipulations of a treaty are intended to bind the whole body of civilized states, it is a pure law-making treaty. When some only are of this

[1] Oppenheim, *International Law*, vol. I, §§ 18, 492, 555–568.

[2] Moore, *International Arbitration*, vol. I, pp. 667–678.

nature, while others refer to special and particular matters, such as a revision of boundaries or a settlement of fishery disputes, it is a law-making treaty, but it is not a pure law-making treaty. This is the case with the Treaty of Berlin of 1878. It added Servia and Roumania to the number of independent states. But it was full of stipulations with regard to minor questions, of interest only to the powers directly concerned.

§ 31

The development of a statute book of the law of nations.

The pure law-making treaties constitute a statute book of the law of nations. The first of them is the Declaration of Paris of 1856. It laid down four rules for the guidance of states when engaged in warfare at sea;[1] and was negotiated by the powers represented at the great Conference of Paris, which settled for a time the near-Eastern question, and concluded the Crimean War, by the Treaty of Paris of 1856. They were seven in number; but five out of the seven were Great Powers.[2] Further, the declaration aimed at universality by making provision for the adhesion of states unrepresented at the conference. The great majority signed immediately. Others have done so since, till at the present time only four signatures are wanting. Moreover, the powers that have refrained from signing have acted, when belligerents, as if they had signed, and have received, when neutrals, the same treatment as signatory powers. Thus the declaration has behind it the express consent of almost all civilized states and the tacit consent of the remainder. It is an international statute, and others have followed it. [During the recent great war, Germany and Austria infringed important parts of the Declaration of Paris, and Great Britain and France were compelled to take measures, by way of reprisal, which involved partial abandonment of the Declaration, at any rate for the remainder of the war. The matter will be discussed later.][3]

[1] See § 243.

[2] See § 113.

[3] [See § 243. Cf. Fauchille, *Droit International Public* (1921), vol. II, §§ 1534[6] *seq.* Oppenheim, vol. I, § 47. *The Marie Glaeser*, L. R. [1914] P. at p. 233.]

The Geneva Convention of 1864 for the amelioration of the condition of the sick and wounded in warfare on land, though signed and ratified originally by only ten powers, was rapidly made general in its application by the adhesion of almost all the rest. It was revised in 1906 by a conference assembled at Geneva, and in its second and improved form has received the ratification of many states. Others will doubtless follow their example; and it must not be forgotten that meanwhile all the outstanding powers, with a few insignificant exceptions, are bound by the first Convention.[1] It is therefore true to say that the Geneva Convention, in one form or the other, is an international statute.

The Declaration of St. Petersburg is another, which was negotiated in 1868 for the purpose of prohibiting the use of explosive bullets in war. It was the work of a commission of representatives from eighteen states, including the Great Powers of Europe. Two more states have formally acceded to it since; and nearly all the others have bound themselves indirectly to observe it by their acceptance of the Hague Regulations of 1899 and 1907 respecting the laws and customs of war on land. The twenty-third article of these regulations forbids various acts "in addition to the prohibitions provided by special Conventions." Of these Conventions the Declaration of St. Petersburg is one; and therefore the powers who have bound themselves to obey the Hague regulations have *ipso facto* bound themselves to submit to the restriction laid down in the St. Petersburg Declaration.[2]

The Convention that provided for the neutralization of the Suez Canal[3] must be reckoned among pure law-making treaties. After negotiations extending over 1887 and 1888, it was signed in October of the latter year by the six Great Powers of Europe, and Holland, Spain, and Turkey,[4] that is to say, by all the states most closely interested in the matter with which it dealt.

[1] Whittuck, *International Documents*, pp. 5, 82, and notes.

[2] *Ibid.*, pp. 10, 11, 43, 135; Holland, *Laws of War on Land*, pp. 41, 121–123, 141.

[3] See § 90.

[4] [The powers of Turkey with respect to the Convention have been assumed by Great Britain. See § 90.]

Other states have accepted it tacitly, and their ships have conformed to its provisions when passing through the Canal. We must therefore hold it to be an international statute. It is, however, premature to place the Hay-Pauncefote Treaty of 1901 in the same category, though it dealt in almost exactly the same way with a similar problem. But Great Britain and the United States are the only parties to it, and therefore the only powers legally bound by the rules laid down in it for the navigation of the Panama Canal [which was opened in 1914]. Moreover, they disagreed as to the true meaning of one of them; and they certainly claim no right of setting laws to the rest of the world. Yet inasmuch as the rules embodied in the treaty are just in themselves, and based in almost every detail on those which have gained universal acceptance in the case of the Suez Canal, probably a tacit but general acceptance of them will follow the junction of the Atlantic and the Pacific by an artificial waterway. Should this happen, the treaty will become a pure law-making treaty, though it is not one at present.

§ 32

The rudiments of an international legislature.

But the best examples of international statutes are to be found in the Conventions negotiated by the Peace Conferences at The Hague in 1899 and 1907. They differ from all others in that they are the work of great international assemblies which came together for the express purpose of endeavoring to make laws for the whole family of nations, not on one question, but on many. In fact, they were rudimentary legislatures; and it is remarkable that the first of them stepped into that position almost by accident. It owed its origin to the humanitarian impulse of the Emperor Nicholas II of Russia, who was deeply impressed at the beginning of his reign by the havoc of warfare and the economic waste of incessant preparation for it. He therefore proposed a great international conference for the purpose of coming to a common agreement upon "the most effectual means for securing to all peoples the benefits of a real and durable peace, and above all, for putting an end to the

progressive development of the present armaments." [1] Peace and disarmament were the objects in view. But diplomatic discussion soon showed that it was more practicable to regulate war than to abolish it; and the programme of the conference, issued early in 1899, included the revision of the laws of war on land and the regulation of Red Cross work at sea.[2] When the delegates of the powers met at The Hague in May, 1899, they proceeded to negotiate a Convention for the Pacific Settlement of International Disputes, a Convention respecting the Laws and Customs of War on Land, and a Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1864. In addition, three declarations were adopted. The first prohibited, for a term of five years, the launching of projectiles and explosives from balloons; the second forbade the use of projectiles destined solely for the purpose of diffusing asphyxiating or deleterious gases; and the third required abstention from the use of bullets that expand or flatten easily in the human body. Nearly all the twenty-six powers represented at the conference signed and ratified these instruments.[3] The exceptions were not numerous enough to deprive the agreements of the character of international statutes. But their existence set up an important difference between the new and rudimentary legislative assembly of the society of nations and the developed legislatures of the separate states which compose it. The individual is compelled by his government to obey laws made in due form, even if he disapproves of them strongly. But the state cannot be coerced by any government set over the society of states, seeing that no such central authority exists. If it refuses its assent to a law, it remains unbound thereby. Tacit consent is as effective, though not as easily proved, as express consent. It may well happen that a state which refused to sign one or more of the Hague Conventions, may act on them so persistently that it becomes bound by custom, though not by convention.

[1] Rescript of the Tsar, August 24, 1898.

[2] Circular of Count Mouravieff, January 11, 1899. Lawrence, *International Problems and Hague Conferences*, pp. 39–41.

[3] Whittuck, *International Documents*, pp. 13–71.

Perhaps the most epoch-making performance of the first Hague Conference is one to which little attention was directed at the time. Before it separated, it expressed various wishes, among them being three, each of which desired that an important matter which it named might be considered by a subsequent conference. It thus suggested that it should not stand alone, like a great war or a great alliance, far-reaching indeed in its consequences, but in itself unique. Instead, it desired to be reproduced with all convenient speed. The words of its Final Act spoke only of a second assembly, but the thought implied a series of assemblies. This was made more manifest by the second conference, which met in 1907, and consisted of delegations from forty-four states, who may be said to have represented among them the whole of civilized humanity. Not only did they recommend the summoning of a third conference at the end of another period of seven years, but they also suggested a method of preparing its business in advance and drawing up a system of organization and procedure.[1] [Troubles in the Balkan peninsula, and the outbreak of the Great War, in 1914, prevented the summoning of the third conference.][2] It is impossible to suppose that these suggestions would have been made unless their authors had contemplated a series of Hague Conferences. A step was thus taken towards the periodical convocation of an international legislature.

The second Hague Conference produced no less than thirteen Conventions, all of which must be placed in the class of pure law-making treaties. Their voluminous character precludes further notice of them here. They will be discussed along with the declarations and wishes of the conference, when we come to deal with the various subjects to which they refer. [At one time it seemed that the Declaration of London, 1909, was likely to be included among pure law-making treaties. Taken in conjunction with eight of the Conventions resulting from the second Hague Conference, it might have become a code covering] a large part of the rights and duties connected with warfare at sea. The circumstances are so peculiar that

[1] Whittuck, *International Documents*, pp. 14, 15, 89.

[2] Lawrence, *Society of Nations*, 69.

they need elucidation. The twelfth of the Hague Conventions of 1907 was concerned with the creation of an International Prize Court, to act as a court of appeal from the national tribunals of the belligerent powers, before whom cases of capture at sea are taken in the first instance. It is obvious that such a court must speak with vast authority, and have an enormous effect in moulding and developing the law of maritime prize. But it is equally obvious that no power whose interests were largely bound up with commerce overseas could submit itself to the judgment of the court, unless it knew and approved beforehand the main principles and fundamental rules by which the decisions would be guided. Some of these have been settled in the course of ages by general consent. The second Hague Conference formulated others. But it failed to reconcile opposing views with regard to several important matters, notably contraband and blockade. Great Britain therefore proposed that the chief maritime powers should send representatives to a Naval Conference in London, for the purpose of making a fresh attempt to resolve outstanding difficulties connected with prize law.[1] The conference met in December, 1908, and sat till February, 1909. It was a smaller and better-organized body than the Hague Conference, and its deliberations were crowned with success to a most encouraging and unexpected degree. On one only of the ten important subjects laid before it was agreement found to be impossible. On another a confessedly incomplete agreement was all that could be reached. These results were embodied in a code of seventy-one articles, called the Declaration of London.[2] It was signed by the ten powers represented at the conference, [but in the end was ratified by none. The misfortune was that it came either too late or too soon—too late for the regulation of a sea-order about to perish owing to advances of science, and too soon for the regulation of a new order whose outlines are yet in the making.[3]]

[1] Despatch of Sir Edward Grey, February 27, 1908. See British Parliamentary Papers, *Miscellaneous*, No. 4 (1909), pp. 1, 2.

[2] British Parliamentary Papers, *Miscellaneous*, No. 4 (1909), pp. 73–92.

[3] [Lawrence, *Society of Nations*, 83–84.]

§ 33

It is clear that great changes are taking place before our eyes; but neither their exact nature, nor the full extent of their operations, is easily discernible. Probably he is wisest who dogmatizes least. Four things, however, seem to stand out plainly. The first is that the society of nations has long ago overpassed the bounds of Europe or of Christendom, and become coextensive with civilization, or at any rate such civilization as is capable of assimilating and acting on those ideas of interstate relationships which sprang up originally among the Christian nations of Europe. The second deals with consent as the foundation of the rules of International Law.[1] Not only has it taken the place of those other supports to which we have recently referred,[2] but it is becoming more and more an express consent, diplomatically given to carefully formulated propositions. [Thirdly, the establishment of the League of Nations, in 1919, marks a great advance upon the Hague Conferences as a conclave of representatives from most—soon, it is to be hoped, from all—civilized states. It will be more fully discussed later.[3] Here, it is enough to notice its continuity of existence as contrasted with the sporadic character of the Hague Conferences, its twofold purpose of keeping international peace and of promoting international coöperation in general, and its great possibilities as an international organ for the purpose of making and coördinating the propositions to which reference has been made in the second point. The limits which an assembly like the League of Nations seems to place on the individual sovereignty of the states composing it] brings us to our fourth point, which we will put in the form of a question.

The possibilities of the future.

Do the developments we have just described modify in any way the Grotian doctrines of the sovereignty and equality of all independent states? Much depends on the sense in which these phrases are understood. If by sovereignty is meant the unfettered exercise of the corporate will on each occasion as it arises, then not only is the existence of Hague Conferences [and

[1] Lawrence, *International Problems and Hague Conferences*, chapters II and III. [2] See §§ 23, 24. [3] See § 221*a*.

of a body like the League of Nations] an encroachment on the independence of states, but any kind of legal restraint is incompatible with the full exercise of international individuality. Nay, more, a society of nations is impossible in any form; for society implies restraint. Surely there must be something wrong with premises from which such conclusions as these inevitably follow. The error lies in supposing that a person, natural or artificial, parts with freedom of will by agreeing beforehand to obey rules that it recognizes as just and necessary, or by being placed under an authority that it helps to create and modify from time to time. Nations are in the former predicament as soon as they become subjects of International Law; individuals are in the latter when they are citizens of self-governing states. Such a natural person is not deemed to be other than a free man, though he is sometimes in a minority and has to submit to laws the making of which he strove with all his might to prevent. And certainly such an artificial person should not be regarded as having lost any part of its sovereignty when it binds itself of its own present free-will to some definite course of action or forbearance in the future. By so doing it parts only with a barbaric freedom to act on the impulse of the moment. Its real sovereignty, that is, its right to control its own destinies, is not impaired when it enters into relations with its fellows which imply mutual concessions and restraints. It may consent to them beforehand and in the mass, or at the time and separately; but in both cases its consent is given. Therefore its sovereignty is preserved as completely under the first plan as under the second. Unless law of any kind subverts freedom, International Law based on general consent assuredly does not.[1]

With regard to the doctrine of equality, the issue is not so clear. Till we have inquired further into the various kinds of states and the position assigned to them by International Law, we are not in a position to discuss the matter. It will be dealt with when we come to consider the rights and duties connected with equality.[2]

[1] [Lawrence, *Society of Nations*, lect. VI.]

[2] See §§ 113–116.

## CHAPTER III

### THE SUBJECTS OF INTERNATIONAL LAW

§ 34

HAVING briefly traced the growth of a society of nations, we have now to attempt a description of the persons who belong to it and come under the rules it obeys. All authorities agree that sovereign states are subjects of International Law. But there are differences of opinion as to whether they are the only subjects. We hold that, while they are by far the most important, they do not stand alone. Individuals must possess the power of directing their own actions and controlling their own lives before they can be received into an ordinary society or club. In the same way a state must be able to determine its own destinies before it can be accounted a member of the society of nations. If its corporate action is settled for it by some external authority, other states will be obliged to deal with that authority. But just as a minor, who has partial, but not full, control of his affairs is sometimes permitted to join a society in a lower grade of membership, so when the domestic government of a state deals with some of its international affairs, while an external authority answers for it in others, it is impossible to regard that state as outside the family of nations entirely, while at the same time it is evident that its membership is not complete. We conclude, therefore, that there are grades and degrees among the subjects of International Law. Besides sovereign states, part-sovereign states and civilized belligerent communities not being states are also subjects of International Law. With regard to corporations and individuals, grave doubts exist.

There are grades among the subjects of International Law.

§ 35

We will begin with *sovereign states*. In order to understand their nature and the nature of their subjection to

International Law, it will be necessary to pass through an ascending series of conceptions, beginning with the rudimentary one of a state.[1] A state may be defined as *a political community, the members of which are bound together by the tie of common subjection to some central authority, whose commands the bulk of them habitually obey.* This central authority may be vested in an individual or a body of individuals; and, though it may be patriarchal, it must be more than parental; for a family as such is not a political community, and therefore not a state. The methods by which the central authority is created are outside our present subject. Whether a political community is governed by hereditary monarchs, or by a person or persons elected by some of its members, it is a state provided that the obedience of the bulk of the people is rendered to the government. If there is no such obedience, there is anarchy; and in proportion as obedience is lacking, the community runs the risk of losing its statehood. A mere administrative division of a greater whole, such as a French department or an English county, would not be called a state; [nor would a colony of the ordinary type, but self-governing colonies like Canada, with their wide powers of autonomy can scarcely be denied the title, though they are not entirely free from political subjection.][2]

Sovereign states.

We have seen what is meant by a state. If we add to the marks already given in our definition of it, the further mark that the body or individual who receives the habitual obedience of the community does not render the like obedience to any earthly superior, we arrive at the conception of a *sovereign or independent state*, which possesses not only *internal sovereignty*, or the power of dealing with domestic affairs, but *external sovereignty* also, or the power of dealing with foreign

[1] In a state the tie which binds the members together is political; that is to say, their sense of corporate unity comes from common obedience to the same government. In a nation the tie arises from community of blood, or language, or religion, or historical tradition, or some or all of these. It is not of itself political, but it almost invariably tends to become political. Other things being equal, a nation-state is stronger and happier than a state which is not a nation.

[2] [See § 40.]

affairs. The commonwealths which compose the American Union possess all the features we have enumerated as the distinguishing marks of states. They are, therefore, rightly so called; but historical and political reasons have sometimes caused them to be alluded to as sovereign states. Strictly speaking, this is a mistake. By the Constitution of the United States all dealings with foreign powers are left to the central government. The executive and legislature of any and every state in the Union are devoid of the slightest power to act in these matters, and have to submit to what is done by the authorities at Washington. They have none of the attributes of external sovereignty. They cannot make war or peace, nor can they send agents to foreign powers or receive agents from them. In other words, they are states, but they are not sovereign states.

But it is not necessary in order that a society may be a sovereign state that its ruler or rulers should never submit to the will of others. In fact, the most powerful empires in the world frequently modify their course of action in deference to the wishes of neighboring states; and no one dreams of asserting that they lose their independence thereby. Such deference and submission is a condition of social life. It is only when it becomes habitual that the state so hampered ceases to be fully sovereign. When Russia, for instance, in 1878, consented to take back the Treaty of San Stefano, which she had made separately with Turkey, and to allow all the great Powers of Europe a voice in settling the questions at issue in the East by another treaty negotiated at Berlin, she did nothing to impair her sovereignty.[1] Nor did the United States lose one jot of its independence when, in 1905, President Roosevelt courteously surrendered to Nicholas II of Russia the initiative in calling together the second Hague Conference.[2] But if it were part of the public law of the civilized world that every treaty made by Russia must be referred to an European Congress, and every international act of the President of the United States must be referred to the pleasure of the Russian

[1] Holland, *European Concert in the Eastern Question*, pp. 220–222.

[2] Lawrence, *International Problems and Hague Conferences*, p. 41.

government, it would be impossible to regard either as a fully independent power. The characteristics, therefore, of a sovereign state are two. Its government must receive habitual obedience from the bulk of the people, and it must not render habitual obedience to any earthly superior.

§ 36

But before a sovereign state can become a *subject of International Law*, it must possess other marks in addition to those we have just enumerated. A wandering tribe without a fixed territory to call its own might, nevertheless, obey implicitly a chief who took no commands from other rulers. A race of savages settled on the land might render a similar obedience. Even a mere fortuitous concourse of men, like a band of pirates, might be temporarily under the sway of a chief with unrestricted power. Yet none of these communities would be subject to International Law, because they would want various characteristics, which, though not essential to sovereignty, are essential to membership in the family of nations. In the first place, the necessary degree of civilization would be lacking. It is impossible for states to take part in modern international society when they are unable to realize the ideas on which it is based. No attempt has ever been made to define the exact amount of affinity in modes of life and standards of thought which must be regarded as essential. Each case is settled on its merits. The area within which the law of nations operates is supposed to coincide with the area of civilization. To be received within it is to obtain a kind of international testimonial of good conduct and respectability; and when a state hitherto accounted barbarous desires admission, the powers immediately concerned apply their own tests.

Some amount of civilization, territory, and importance necessary before a sovereign state can be regarded as a subject of International Law.

In addition to the attainment of a certain, or rather an uncertain, amount of civilization, a state must have possession of a fixed territory before it can obtain the privilege of admission into the family of nations. The rules of modern International Law are so permeated from end to end with the idea of terri-

torial sovereignty that they would be entirely inapplicable to any body politic that was not permanently settled upon a portion of the earth's surface which in its collective capacity it owned. Even if we could suppose a nomadic tribe to have attained the requisite degree of civilization, its lack of territorial organization would be amply sufficient to exclude it from the pale of International Law. But a civilized and independent community, settled upon a tract of land, may be so small that it would be absurd to clothe it with the rights and obligations given by the law of nations to sovereign states. Such a minute community might conceivably exist unnoticed for a little time in some distant corner of the world. But as it would soon be absorbed in a larger body, or reduced to a position of dependence on a powerful state, we need not concern ourselves with the case.

## § 37

The kinds of fully sovereign international persons.

The sovereign states which are subjects of International Law are regarded as units in their dealings with each other. The nature of their internal arrangements is immaterial from the point of view of their fellow-members of the society of nations, just as the division of functions and profits between the partners in a commercial firm is immaterial from the point of view of those who have to do business with it. About unitary states there is no difficulty. With regard to composite states, as long as in any given case there is some authority whose word concerning external relations binds the composite whole, International Law has no need to ask whether in internal affairs it is one state or twenty. To students of political philosophy and constitutional law such questions are immensely important. But all the publicist need know is what kinds of union make their members into one state so far as external sovereignty is concerned, and what kinds preserve the separate international existence of the members of which they are composed, and intrust them with a share in the control of their external relations. In the former class we place *incorporate unions*, *real unions*, and *federal unions;* in the latter, *personal unions* and

*confederations.* But we must remember that there are wide differences of opinion among writers as to the exact meaning of some of these terms, and the proper description to be applied to certain composite states.[1] In fact, the classificatory skill of jurists toils far behind the constructive ingenuity of statesmen. A new constitution is established because it seems likely to work, quite regardless of the fact that, according to the scheme of every text-book, it is an anomaly. It is best to say frankly that the classification we are obliged to use, cannot lay claim to scientific accuracy. It gives us descriptions rather than definitions, types rather than classes.

We will commence by indicating very briefly the nature of those unions which create a new international person in the place of two or more existing previously. There are, first, *incorporate unions.* One of these takes place when an organic whole, with both internal and external affairs under its central government, is formed out of units that were separate international entities in the not very remote past.

Thus the United Kingdom of Great Britain and Ireland, was made up by the incorporation of England and Scotland into one realm in 1707 and the addition of Ireland in 1800.[2] Next come *real unions.* These are junctions of two or more separate states under one monarch, in such a way that each remains sovereign as far as its internal affairs are concerned, while their external affairs are merged, and carried on as a whole in the name of the common head. The state is thus one international person, though internally it is composite. This was the case with Austria and Hungary. Each limb of what was called the Dual Monarchy possessed its separate organization for legislative and administrative purposes; but there were common ministries for foreign affairs and war, and other powers carried on diplomatic intercourse with a single entity known to them as the Austro-Hungarian Empire. [The union has ceased to exist since the collapse of the Austro-Hungarian Empire in 1918.] Sweden and Norway were brought together in an

[1] See, for instance, Oppenheim, *International Law*, vol. I, §§ 85–111, and Westlake, *International Law*, part I, pp. 20–39.

[2] [See now the Government of Ireland Act, 1919.]

union of the same kind in 1814, and remained so joined till their peaceful severance by the Treaty of Karlstad in 1905. In *federal unions* there is a central body defined by the constitution and charged with the exclusive control of the international relations of the whole. There are also member-states, who have greater or less power over their internal affairs, but none whatever over external matters. The federal government represents the whole body politic to foreign states, with whom it makes war and peace, and carries on diplomatic intercourse. It is an international person speaking on behalf of the whole union, the component parts of which have no international status. The United States of America is the best and most prominent instance of a power of this kind.

*Real unions* must be distinguished from *personal unions* which, strictly speaking, are not unions at all. They are said to arise when the same monarchical person happens to be head of the state in two or more political communities. But since each of these communities retains unimpaired all the powers of sovereignty, and neither is legally affected in any way by the other as regards its dealings with foreign states, it is clear that the so-called union has no existence. Each of the members who are said to compose it remains a separate international person, as did England and Hanover from 1714 to 1837, during which period the king of the former country was also elector of the latter. Considerations of a similar kind apply to *federal unions* and *confederations*. They differ in that the states united in a *confederation* retain for themselves the right of dealing directly with foreign powers, though in some external matters the central authority acts for the whole body; while, as we have already seen, the distinguishing mark of a *federal union* is that its member-states are totally excluded from the domain of foreign affairs. Each confederated power is therefore an international person, like each of the states brought together in a so-called *personal union*. But, unlike such states, it is not an international person in the fullest sense, and the statement is true of the central body also. We shall discuss their position when we deal with limitations of sovereignty (§ 40). Our present concern is with those subjects of International Law which

are fully sovereign states, and we have seen reason to include among them, besides independent unitary states of the ordinary type, *incorporate unions*, *real unions*, *federal unions*, and the separate states that are erroneously supposed to be joined together in *personal unions*. The question whether the Great Powers occupy a position of legal preëminence over other sovereign states will be discussed in Part II, chapter iv.

§ 38

We have now to consider *states which are not fully sovereign*. As a general rule the domestic government in a political community exercises over the members of that community all the powers of sovereignty. But in some exceptional cases it exercises a portion of them only, the remainder being vested in the government of another country, or, in confederations, given to some central authority. If the division of powers gives internal affairs to the home government, while some outside authority has complete control of external relations, International Law will recognize only the power that deals with other states in the name of the community in question. It will have no more to do with the domestic rulers than it has with the mayor of an English city or the governor of an American state. But if a division is made of external affairs, and some of them are assigned to the home government, while others are dealt with by an authority outside it, International Law must recognize both. Yet in such a case it is clear that the local ruler occupies a position very different from that of the chief of an ordinary independent and fully sovereign state. His authority is restrained and conditioned by that of the external power which shares with him the direction of his foreign affairs. The independence of his state is not full, but limited. It is not sovereign in the sense that Great Britain or France or Italy is sovereign; and yet it must be regarded as a subject of International Law, since the external matters controlled by the domestic government come within the ambit of that law. It possesses an international personality, though of an inferior kind. It would be pedantry to exclude it from the family of nations because it is not wholly

Part-sovereign states.

sovereign; just as it would be cruelty to exclude from the social family a half-brother, or half-sister, because a family is generally spoken of as a married pair and their offspring. Communities of the kind we are considering used to be called semi-sovereign states. But the term seems to imply an equal division of the powers of sovereignty between the local and the foreign rulers. We will, therefore, use instead, the phrase *part sovereign states*, since it more correctly describes a class of communities in which any portion of the powers of external sovereignty, from nearly all to almost none, may be possessed by the home government.

Part-sovereign states may be defined positively as *political communities in which the domestic rulers possess a portion only of the powers of sovereignty, the remainder being exercised by some external political authority*, or negatively as *states which do not possess absolute control of the whole of their policy*. But no such state is a subject of International Law unless the division of powers cuts athwart external affairs, assigning some of them to the home government, and some to the outside authority. When a political community is obliged to submit itself habitually in some matters of external importance, to the control of another state, it is for international purposes in a condition of part-sovereignty. When a number of political communities join themselves together into a confederation, each of the states thus confederated, and also the central authority of the confederation, are for international purposes in a condition of part-sovereignty. We thus obtain two divisions of part-sovereign states, and it will be convenient to consider each separately. But before we do so we must exclude altogether from our classification such communities as the native states of India and the Indian tribes of North America. The former are sometimes spoken of as independent states; but in reality they are not even part-sovereign in the sense given to that term by International Law; for they may not make war or peace, or enter into negotiations with any power except Great Britain.[1] The latter have been adjudged by the United States Supreme Court in the case of the *Cherokee Nation* v. *The State*

[1] Westlake, *International Law*, part I, pp. 41–43.

*of Georgia*, not to be foreign states, but "domestic dependent nations."[1] They cannot deal in any way with any power other than the United States, and consequently International Law knows nothing of them.

§ 39

We must now consider that class of part-sovereign states whose domestic rulers find themselves limited and conditioned in dealing with external affairs by the rights of control vested in the government of an external power. Some states of this kind are spoken of as protectorates. Of others it is said that they are under suzerainty. These terms are very unsatisfactory. Instead of setting forth any common feature of the cases that are classed under them, they have themselves to be explained by the circumstances of each particular case. It is generally laid down that a protectorate involves the surrender to the protecting state of the right to control all that is really important in the foreign affairs of the protected state, while purely domestic matters are managed by the home government.[2] What else is implied by suzerainty it would be difficult, if not impossible, to say.[3] But if we turn to the historical instances, we can find protecting states that controlled all the affairs, both domestic and foreign, of the protected state, and suzerains whose power did not extend to any real control of even the foreign relations of the vassal state. A good example of the first is found in the protectorate exercised by Great Britain over the Ionian Islands from 1815 to 1863, in which latter year they were united to Greece. During the period named they were practically governed by British commissioners, and could not accredit diplomatic representatives, or even consuls, to other powers; while, to complete the mystification, they were described as independent in the treaty that placed them under British protection.[4] As an example of the attenuated dimensions which

Client states.

[1] Peters, *Reports of the United States Supreme Court*, vol. v, p. 1.

[2] Nys, *Droit International*, vol. I, p. 364; Rivier, *Droit International*, vol. I, pp. 83, 84.

[3] [Cf. Oppenheim, *International Law*, vol. I, §§ 92–93.]

[4] Holland, *European Concert in the Eastern Question*, pp. 46–50.

the powers of a suzerain may assume, we may point to the case of Bulgaria while it was under the suzerainty of Turkey from 1878 to 1908. During all this time the wishes of the Sultan were constantly set at naught when they clashed with the aspirations and designs of the Prince of Bulgaria and his government. Not only had the nominal suzerain no control of internal affairs, but Bulgaria made war and peace without reference to his authority, incorporated Eastern Rumelia in 1885 in defiance of him, elected a new prince in 1887 without his sanction, and finally proclaimed its independence in 1908.[1]

It is clear from these cases, which could easily be supported by others of a similar kind, that the terms we are considering have frequently been used in strained and non-natural senses. This, coupled with their intrinsic vagueness, renders them unfit for purposes of scientific classification. In diplomacy one great object is to disguise unpalatable facts in pleasant words. This alone, useful as it often is to secure assent to arrangements that would have excited keen resentment if set forth in their naked harshness, disqualifies the language of many international instruments for use when precision of statement is above all things desirable. In order to group together under an appropriate heading the part-sovereign states which we are now discussing, we want a phrase that expresses dependence, but does not attempt to set forth the extent of it or the exact nature of the subjection implied, except that it is concerned with external affairs. Might we not give the name of *client states* to all those international persons who are obliged to surrender habitually the conduct of their external affairs in any degree, great or small, to some state authority external to themselves? A client implies a patron; and the *patron state* is, of course, the state who acts on behalf of the client state in the manner defined either by long-continued custom, or by the terms of some formal agreement, or by both. But the extent to which it may act is left by the terms of description purposely vague. Its power may be as wide as was that of Great Britain in the case of the Ionian Islands, where the only shred of external sovereignty left to

[1] *Statesman's Year Book, 1909*, pp. 666, 667.

the local government was that it might receive foreign consuls,[1] or it may be as narrow as was that of Turkey with regard to Roumania and Serbia from 1856 to 1878, in which latter year the independence of both was recognized by the Treaty of Berlin.[2]

One advantage of the proposed nomenclature would be that its adoption would render unnecessary for the purposes of International Law any attempt to discriminate between protectorates and states under suzerainty; and we should, in consequence, be spared those differences of definition and classification which are such a stumbling-block to students and of so little value for their instruction.[3] Another is that the suggested phrase would include those cases in which terms of superiority and inferiority are carefully avoided, while the facts are eloquent of the existence of dependence, sometimes in a very marked form. Cuba, for instance, was made into an independent state by the Treaty of Paris of 1898 [and, as such, made a separate declaration of war on Germany in 1917, and after the war was separately represented at the Conference that resulted in the Treaty of Versailles, 1919, to which Cuba was a signatory]; but it is, in fact, subject in the last resort to the controlling authority of the United States, whose arms won its so-called independence, and whose troops occupied the island not only during the period of resettlement from 1898 to 1902, but also from 1906 to 1909. On the second occasion they were present in pursuance of the terms of the Cuban Constitution of 1902, and the provisions of a treaty of the following year whereby a right of intervention was expressly given to America "for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property and individual liberty," and for other purposes. One of the occasions contemplated in the treaty arose in 1906, when a revolution broke out and President Palma resigned his office. A provisional governor was appointed by the

[1] Westlake, *International Law*, part I, p. 24.

[2] Holland, *European Concert in the Eastern Question*, pp. 251–253, 297–303.

[3] Westlake, *International Law*, part I, pp. 22–27; Oppenheim, *International Law*, vol. I, §§ 90–94.

United States, and his authority restored order and reformed abuses. The way was thus prepared for an honest election, at which General Gomez secured the presidential chair. As soon as his administration was firmly established, the American governor and troops were withdrawn, and the island was left to its own domestic rulers.[1] The United States acted in good faith throughout [as it also did in refraining from armed intervention in the abortive rebellion of 1917];[2] but only the future can decide whether local ability and patriotism can maintain a stable government. If there should be failure in this respect, the American Union must be the successor of the moribund state.[3] In addition to the right of intervention provided for in the Cuban Constitution, the United States has secured by treaty the possession of two coaling stations on the coast, and has limited the treaty-making powers of the local government. No stipulation is to be entered into to the detriment of Cuban independence—a provision evidently meant to prevent the growth of any claims inconsistent with those of America.

On the facts just enumerated, we conclude that the relations between the Cuban Republic and the United States differ greatly from those that subsist between two independent states of the ordinary type. Such terms as suzerainty and protection have been so carefully avoided in all official documents that to use them might be regarded as indiscreet. But there can be no reasonable objection to a description of Cuba as a client state. The same phrase will apply to Korea in its relation to Japan from 1904 to 1910, at which latter date it was formally annexed. By the protocol of February 23, 1904, the Japanese government guaranteed the independence of the Korean Empire; but by subsequent agreements, financial and diplomatic advisers were to manage various departments of the Korean administration, and the control of the ports, telegraphs, and telephones of Korea was handed over to the Jap-

[1] *American Journal of International Law*, vol. I, pp. 149, 150, and vol. III, pp. 431, 432. [2] [*Ibid.*, vol. XI, pp. 419–423.]

[3] For a grave warning from President Roosevelt, see *Foreign Relations of the United States, 1906*, part I, p. xlv.

anese authorities. A further step was taken on November 17, 1905, when it was settled that the Japanese foreign office should direct the external affairs of Korea.[1] Yet as diplomatic representatives from foreign powers were still accredited to the Court of Seoul, the country continued to be regarded as an international person, though there would have been no abuse of terms in describing it as a client state. As the phrase leaves indefinite the amount and degree of control, it applies equally well to all the dependent states known to International Law which figure on the lists given in some of the leading modern works.[2] Such states can hardly continue for long in their anomalous position. They will grow either stronger or weaker. In the first case they will strive for complete independence. In the second they will be absorbed by the patron state, as was Korea by Japan, under the provisions of the treaty of August 29, 1910.[3]

§ 40

Confederations.

Part-sovereign states of the second class now demand our attention. We have already called them confederations, in order to distinguish them from the more closely united group to which we have given the name of federal unions. The terms are not very happy, but they are the best available. Composite states are generally divided into these two kinds. The first, called in German a *Bundesstaat*, comprises those unions in which the central authority alone can deal with foreign powers and settle external affairs, the various members having control over their internal affairs only. In the second, called a *Staatenbund*, are included all groups where the states that have agreed to unite have retained for themselves the power of dealing directly with other states in some matters, the remaining external affairs being reserved by the federal bond to the central authority.[4] The best

[1] Lawrence, *War and Neutrality in the Far East*, 2d ed., pp. 282–285; *Supplement to the American Journal of International Law*, vol. I, pp. 217–226.

[2] See Oppenheim, *International Law*, vol. I, §§ 108–111, and Rivier, *Droit International*, vol. I, pp. 85–93.

[3] *American Journal of International Law*, vol. IV, pp. 923–925.

[4] Heffter, *Das Europäische Völkerrecht*, §§ 20, 21.

examples of the former now in existence are the United States of America and Switzerland. No good example of the latter remains to the present time; but the German Confederation, which lasted from 1815 to 1866, is the great historical instance. Each member had the right of entering into relations with foreign states, provided that it did nothing against the security of any other member or of the Confederation itself. The central authority was vested in a Diet which sat at Frankfort, and was composed of the ministers of the separate states. It had the power of making treaties, sending and receiving ambassadors, and declaring war against foreign powers if the territory of the Confederation should be threatened by them. On the other hand, the separate states sent representatives to one another and to foreign states.[1] The full powers of sovereignty over the territories in the Confederation were thus divided between the Diet and the home government of that territory.

From the point of view of International Law, a *Bundesstaat* does not differ from an ordinary sovereign state. It forms but one state in relation to foreign powers. Internally it may consist of many states; but as they have no right of sending and receiving diplomatic missions, or making peace or war, foreign powers have as little to do with them as they have with the administrative divisions of an ordinary state. The case of a *Staatenbund* is different. It is a bundle of separate states, each of which retains some of the rights of external sovereignty while it is deprived of the remainder. Accordingly the states that compose it must be placed by International Law among those part-sovereign communities which we regard as the second class among its subjects. They are something more than administrative divisions of a larger whole. They are something less than sovereign states. But they have a real, though limited, international personality; and what is true in this respect of them is true also of the central government.

It is sometimes exceedingly difficult to refer a given composite state to either of the types depicted above. The Swiss Confederation, for instance, was at its inception a union of the looser kind. Since the last revision of its constitution in 1874 it

[1] Wheaton, *International Law*, §§ 47–51.

can be regarded as a federal union or *Bundesstaat*. But at certain periods of its history it could hardly be called the one or the other with any regard to strict accuracy. The German Empire, which was constituted in 1871 in consequence of successful war with France, [and existed till 1919] was in much the same predicament. The central authority made war and peace, sent and received ambassadors, and negotiated treaties for political and commercial objects. But the governments of the states that formed the Empire had the right of accrediting diplomatic representatives to foreign powers and receiving representatives from them to deal with matters not reserved to the Imperial Government. Probably the diplomatists in question were not overwhelmed with work; for it was difficult to discover in the Constitution of the Empire any important matters left for them to deal with. But since a right of separate diplomatic intercourse with foreign powers was vested in the federated states, we are unable to say that the Empire was a true *Bundesstaat*, however insignificant the deflections from that type may have been. At the same time, it was equally impossible to call it a *Staatenbund*, in view of the fact that for all practical purposes the central authority alone transacted the external business of the union. [As a result of the great war, the German Empire was destroyed by a revolution. The Constitution, which was finally authorized August 11, 1919, declared the German Realm (*Reich*) to be a republic. Article 78 vests the conduct of foreign affairs exclusively in the central Realm, and, while it allows the territories (*Länder*) composing the Realm to make treaties with foreign states on matters falling within their legislative competence, it provides that such treaties require the consent of the Realm.][1] History shows that composite states of the lower type of union are politically in a condition of unstable equilibrium. None of the true examples of that type has survived to the present day. Their members either separated and formed fresh combinations, as did those of the German *Bund*, or strengthened the federal pact till their union became a *Bundesstaat*, as did those of the Swiss Confederation.

[1] [*History of the Peace Conference*, vol. III, pp. 347, 361.]

[Recent events have made it no longer possible to dismiss the British self-governing dominions, Canada, Australia, New Zealand, and South Africa as colonies which are merely part of the British Empire and possess no international personality of their own. And the same applies to India, which, like these dominions, was separately represented at the Peace Conference after the great war. Moreover, all became original members of the League of Nations, with representation separate from that of Great Britain in the Assembly of the League.[1] Hence, as has been pointed out, they have become members of the "organized Family of Nations,"[2] and this marks a wide difference from their pre-war position. Again, since May, 1920, Canada has been given by the mother country the right to send a minister, as her own representative, to the United States of America; in other words, she has been conceded a right which is one of the special attributes of international personality. This minister was to be appointed by the King on the nomination of the Dominion government, and his primary duty was to deal with all diplomatic questions arising between the British Crown and the United States affecting Canada only. In the absence of the British ambassador, he was to take charge of the whole embassy and of the representation of Imperial as well as of Canadian interests. The post so far has not been filled.[3] One is tempted to compare these great dominions to members of a *Staatenbund*, but an attempt at exact classification would be premature, for it is much easier to note their acquisition of international personality than to say exactly what that personality is. At present, their changed, and still changing, position, is just as impalpable in International Law as in Constitutional Law. However, it may at least be said that current tendencies set towards a still more vigorous development of international personality by these British possessions.]

[1] [Treaty of Versailles, 1919. Annex (after Art. 26).]

[2] [Oppenheim, *International Law*, vol. I, §§ 94*a*, 94*b*.]

[3] [Keith, *War Government of the Dominions*, pp. 172–175. This excellent monograph should be studied on the whole topic.]

§ 41

We have now to consider the relation in which *civilized belligerent communities not being states* stand to International Law. We have reckoned them among its subjects, and it remains for us to justify our classification.[1] These communities have not received recognition as sovereign states; but their governments possess the essential attributes of sovereignty, and they desire admission into the family of nations. Why, then are they excluded from full membership? Because the fact of their sovereignty may be a temporary phenomenon. They are endeavoring by war to cut themselves adrift from the state of which they form a part, and to set up a separate national existence of their own; and while serious efforts are still being made for their subjection, the government they have created may at any moment be overturned, and they may relapse into their former condition of component portions of a larger political whole. Accordingly they are not recognized as independent states while the struggle is proceeding with any semblance of vigor on the part of the mother-country. But meanwhile they are levying armies, equipping cruisers if the contest is maritime, and carrying on war in a regular and civilized fashion; and those states who are brought into contact with their operations must decide whether to regard them as lawful or unauthorized. In a case such as we have supposed, there can be no doubt of the decision. War exists as a fact, and interested states must open their eyes to it. This they do by according to the incipient political community what is known as recognition of belligerency. The effect of their action is to endow the community with all the rights and all the obligations of an independent state so far as the war is concerned, but no further. Its armies are lawful belligerents, not banditti; its ships of war are lawful cruisers, not pirates; the supplies it takes from invaded territory are requisitions, not robbery; and at sea its captures made in accordance with maritime law are good prize, and its blockades must be re-

Civilized belligerent communities not being states.

[1] See § 34.

spected by neutrals. But on the other hand, its government cannot negotiate treaties, nor may it accredit diplomatic ministers. The intercourse it carries on with other powers must be informal and unofficial. It has no rights, no immunities, no claims, beyond those immediately connected with its war. It is thus a subject of International Law only in a limited and imperfect manner. The subjection is very real as far as it goes, though it covers but one portion of the activity of a state and does not extend to the normal relations of peaceful intercourse. Should the belligerent community succeed in defeating all the attempts of the mother-country to subdue it, sooner or later existing states will accord to it recognition of independence, and it will then stand on the same footing as they do, and become a subject of International Law in all things. We shall see later in this chapter what are the conditions of recognition of independence, and when we come to deal with the subject of war we shall discuss under what conditions recognition of belligerency may be given without affording to the parent state just ground of offence.[1]

## § 42

Having gone through the list of the undoubted subjects of International Law, we must proceed to deal with the doubtful cases of *individuals* and *corporations*. With regard to them there are great differences of opinion. It is argued on the one hand that by the very nature of things International Law is a law between states and states only.[2] When answer is made that it allows aggrieved governments to deal severely with foreign pirates or neutral blockade-runners,[3] and grants security to subjects of one country visiting another about their lawful business, we are told that these powers and rights are not conferred directly by International Law, but are taken and given in conformity with it. The municipal laws of civilized states grant various rights to foreign

The doubtful cases of individuals and corporations.

[1] See §§ 46, 141.

[2] Oppenheim, *International Law*, vol. I, § 13; Hall, *International Law*, 7th ed., p. 17.

[3] Westlake, *Chapters on the Principles of International Law*, pp. 1, 2.

individuals who come within the territory in which they prevail. They do so, however, because International Law demands of each member of the family of nations that it shall protect the life and property of all harmless folk within its borders. Again, foreign individuals sometimes suffer under the rules of maritime capture and the laws against piracy. But this happens because International Law requires that the states to which they belong shall not protect them from the consequences of such serious misdeeds when imposed by other states in accordance with accepted practice. Thus the argument runs, and it is difficult to see where the advantage lies. Probably it is best to say with Oppenheim [1] that persons, like territory, are objects of International Law, and reserve the term subjects for those artificial persons who are either sovereign states, or communities closely akin to them through the possession of some of the distinguishing marks of statehood.

What we have said of individuals might apply equally well to *corporations* as owners of property, were it not that some of them are endowed with special privileges and hold a peculiar position. The ordinary corporation can be relegated to the same position as the ordinary individual. But it is difficult to fix the international status of those great chartered companies which have been called into existence by some of the colonizing powers, especially Great Britain, to open up enormous territories when first brought within the sphere of their influence. We refer to such privileged corporations as the British North Borneo Company, and the British South Africa Company. The latter is probably the strongest and most important of them all. It may be considered typical of its class; and an examination of the powers conferred upon it will throw light on the problem before us.

By Order in Council dated January 18, 1889, Queen Victoria granted to a group of noblemen and gentlemen a royal charter of incorporation as a British company, formed for the purpose of carrying into effect concessions made by the chiefs and tribes of a region which stretches, as extended by further grant from

[1] *International Law*, vol. I, § 290.

her Majesty in 1891, from the Transvaal territory and the 22d parallel of south latitude to the southern limits of the Congo Free State and [what was then] German East Africa, and is bounded on the east and west by Portuguese and [as they were then] German spheres of influence and the Nyassaland Protectorate of Great Britain. Within this enormous territory the company possesses, under the original charter and subsequent Orders in Council, the liberty to acquire by concession from the natives "any rights, interests, authorities, jurisdictions, and powers of any kind or nature whatever, including powers necessary for the purposes of government." This right is to be exercised subject to the approval of the Secretary of State for the Colonies, whose consent has to be gained to the legislative ordinances the company may promulgate, and whose arbitration may be offered, and must be accepted if offered, in case any differences arise with any native chief or tribe within the territory. The company may use a distinctive flag indicating its British character. It is bound not to set up any monopoly of trade, nor to allow the sale of intoxicants to the natives, nor to interfere with their religious rites except for purposes of humanity. It must maintain courts for the administration of justice, and pay due regard therein to native laws and tribal customs. The discouragement and gradual abolition of the slave trade and domestic servitude are made obligatory upon it. The suggestions of the Colonial Secretary are to be adopted if he dissents from "any of the dealings of the company with any foreign power," and proper attention is to be paid to the requirements and requests of the Resident Commissioner appointed by the Secretary of State. There is also a Secretary for Native Affairs, whose business it is to safeguard the rights of the native population. Further, the company is bound to perform, under the direction of the Colonial Secretary, all obligations contracted by the Imperial Government with foreign powers in so far as they relate to its territory and its activities. And lastly, the Crown reserves a right to revoke its charter at any time, if it exercises its powers improperly, and to alter or put an end to so much of the charter as relates to administrative and public matters after twenty-five years

from the first grant, and at the end of every succeeding period of ten years.[1]

It is easy to see how the natives must regard a body of men armed with such authority as that granted to the British South Africa Company, and possessed of skill, energy, scientific machinery, and weapons of precision. To them the company must be all-powerful. It legislates, it administers, it punishes, it negotiates, it makes war, and it concludes peace. As regards the native tribes, it exercises all the powers of sovereignty. Yet all this vast fabric of supremacy rests upon the foundation of a royal grant which is subject to be revoked at any time if the advisers of the British Crown are dissatisfied with the conduct of the company, and is exercised from day to day at the discretion of a royal officer who has power to disallow the company's acts and insist upon obedience to his requirements. And behind all stands the reserved supremacy of the Imperial Parliament, which could by legislation make any alteration it pleased in the constitution and position of the company, or even abolish it altogether. Clearly, then, it is no independent authority in the eye of British law, but a subordinate body controlled by the appropriate departments of the supreme government. Like Janus of old, it has two faces. On that which looks towards the native tribes all the lineaments and attributes of sovereignty are majestically outlined. On that which is turned towards the United Kingdom is written subordination and submission. We may extend the simile and make it apply to all the other chartered companies of which we spoke. They are sovereign in relation to the barbarous or semi-barbarous inhabitants of the districts in which they bear sway. They are subject as regards the governments of their own states. History supplements abstract reasoning, and by showing how England's East India Company ruled a mighty empire, and yet was subject to British legislation and was at last swept away altogether by the action of Queen and Parliament, confirms in a striking manner this view of the position of chartered companies. Inasmuch as they exercise, over vast territories and towards numerous populations, state

[1] *London Gazette*, December 20, 1889; *Statesman's Year Book*, 1909, p. 205.

authority delegated by the international person who created and could at any moment destroy them, they may be regarded as international persons themselves, though of a very imperfect and subordinate kind.

§ 43

The results we have reached may be summarized as follows.

Anomalous cases—colonial protectorates, neutralized states, Egypt, the papacy.

The subjects of International Law are sovereign states and those other political bodies which, though lacking many of the attributes of sovereign states, possess some to such an extent as to make them real, but imperfect, international persons. These are part-sovereign states, under which term we include client states, and also confederations, together with the member-states that compose them; civilized belligerent communities whose belligerency, but not whose independence, has been recognized; and chartered companies to whom have been delegated vast governmental powers. Individuals we have seen reason to regard rather as objects than as subjects of a law that exists between states, though we recognize fully that private persons may and do, especially while war is going on, perform on their own responsibility acts that bring them into direct contact with the rules of International Law. But before we pass on to deal with admission into the society of nations, we will describe briefly a few anomalous cases connected with international personality.

1. The first is that of *colonial protectorates*, as they are sometimes called. These are comparatively modern expedients, and differ from the old-fashioned protectorates we have already discussed in that, instead of being a relation between two states, both known to International Law, each of them may better be described as an attitude on the part of a civilized power towards a district and population too uncivilized to be regarded as a state of International Law. Protectorates proper involve both a protecting and a protected state, as, for example, the little mountain republic of San Marino, an enclave of Italy, which is now under the "exclusive protective friendship" of the latter power; [1] [so too, Iceland became a pro-

[1] Rivier, *Droit International*, vol. I, p. 92.

tectorate of Denmark in 1918, and the Treaty of Versailles, 1919, which constituted Danzig a "Free City," placed it under the protection of the League of Nations].[1] But in colonial protectorates there is, as Westlake pithily says, "no state to be protected."[2] The east side of Africa, from Delagoa Bay to the Egyptian frontier, is studded with British, Portuguese, the Italian, and French protectorates, which have in common two features. In the first place, they do not cover the territory with a civilized administration, but direct and control in greater or less degree the native chiefs and headmen; and in the second place, they allow no other civilized state to exercise authority within the protected district, or enter into anything resembling international relations with its native rulers. Opinions differ as to the responsibility of the protecting states to foreign countries for the acts of the native peoples of the protectorate, and their jurisdiction over the subjects of such countries found within the protected area.[3] Whatever views may be held on these points, it is beyond doubt that the assumption of a colonial protectorate is a sort of halfway house towards complete annexation, and as such will be discussed when we come to deal with rights over territory.[4] Such protectorates cannot be client states, for they are not states at all in the sense of being members of the family of nations and subjects of International Law. In so far as its rules are concerned with them, it is because they are, as it were, inferior members of the household of an important international person, the protecting power.

*Permanently neutralized states* might appear to form another anomalous case. There [is now only one] of them in Europe,—Switzerland. Belgium and Luxemburg [ceased to be such by the Treaty of Versailles, 1919].[5] The peculiar condition [of a European state of the type of Switzerland is that its] perma-

[1] [Art. 102–108. Cf. *American Journal of International Law*, vol. XIV, pp. 628–629.]

[2] *International Law*, part I, p. 24; see also Rivier, vol. I, pp. 89, 90.

[3] Westlake, *Chapters on the Principles of International Law*, pp. 177–187; *Collected Papers*, 181–191. Hall, *Foreign Jurisdiction of the British Crown*, pp. 204–227.

[4] See § 80.

[5] [Art. 31, 40.]

nent neutrality is guaranteed by the Great Powers of Europe on condition that it does not go to war except for the defence of its own territory when attacked, and does not in time of peace enter into any engagements that might lead it into hostilities for other than purely defensive purposes. It has in consequence been argued that it ought, strictly speaking, to be reckoned among part-sovereign states, since these restrictions amount to limitations of independence. A fully sovereign state can make what treaties it pleases with any power who is willing to enter into stipulations with it, and go to war whenever it deems that circumstances justify so extreme a step. To deprive it of these rights is to restrict its external sovereignty; and when a state is made to suffer such a deprivation, not temporarily and for a special purpose but, permanently and as a condition of its existence, it can hardly be regarded as an international person in the fullest sense of the word. On the other hand, it has been pointed out that states constantly limit their future action by present agreements, and that such stipulations are not held to derogate from sovereignty. This is perfectly true; but then the agreements are made by an international person who is free to make them or not, as he pleases, and can withdraw from them as opportunity offers, whereas permanently neutralized states do not possess this freedom. They can, of course, if they please, make war and negotiate in defiance of the treaties of guarantee and at the risk of intervention by the guaranteeing powers. But this is only another way of saying that a state, like a man, possesses the physical capacity to do all manner of forbidden things, provided that it is willing to risk the consequences in the way of death or lesser punishment. It is also true that permanently neutral states are not placed under the suzerainty or protectorate of the powers who have guaranteed their neutrality. The little bits of sovereignty taken away from them are not bestowed elsewhere. They are in abeyance; and the fact that they are shows that the assumed necessity for the existence of full powers of sovereignty as regards every part of the civilized world is no necessity at all, just as the division of sovereignty between client and patron states shows that the doctrine of the indivisibility

of sovereignty is unsound.[1] But the powers of which the governments of permanently neutralized states are deprived are so extremely small in comparison with those which they have in full possession, and the position occupied by such states as regards rank, honor, and influence is so entirely unaffected by their neutralization, that it might be accounted pedantry to insist on classing them along with part-sovereign states, though they may not lawfully exercise one or two prerogatives of full sovereignty. They are anomalies whose anomalous character requires a jural microscope to discover it. Therefore they had better be treated as if they were in no way anomalous.

The international transactions which have taken place within the last hundred years with regard to outlying parts of the Turkish Empire have yielded a plentiful crop of puzzles and anomalies. He would be a bold jurist who would undertake to give a direct answer to the simple question whether *Cyprus* was a British or a Turkish possession. The right of occupying and administering it was granted by Turkey to Great Britain under a Convention of 1878; but the substantial sum of £92,800 was paid yearly by the British government to the Porte, as representing the excess of revenue over expenditure at the time when the islands changed hands. [On the outbreak of war with Turkey, in 1914, Great Britain annexed Cyprus. In the Treaty of Peace, signed at Sèvres, August 10, 1920, Turkey renounces all her rights over Cyprus, and together with the other contracting parties (France, Italy, Japan, Armenia, Belgium, Greece, the Hedjaz, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, and Czecho-Slovakia) recognizes the British Annexation.[2] The Treaty is still unratified.] In the case of *Crete* we had from 1898 to 1912 the Sultan of Turkey as nominal suzerain; a High Commissioner appointed by the four guardian powers, Great Britain, France, Russia, and Italy; an assembly, all but ten of whose members were elected by the people; domestic affairs administered by the High Commissioner and his Council of Ministers, and foreign affairs in the hands of the representatives of the four

[1] Westlake, *International Law*, part 1, pp. 27–30; Oppenheim, *International Law*, vol. 1, §§ 95–101.

[2] [Art. 115, 116.]

powers at Rome. The people were determined on annexation to Greece; Turkey was determined to prevent such annexation; and the guardian powers were determined to maintain the *status quo*, which seemed to mean that the Turkish flag should fly unmolested on a rock in Suda Bay, and the islanders should be free to cultivate as close relations with Greece as they pleased if only they abstained from legal union. In 1913, in consequence of the defeat of Turkey by the Balkan Allies, a practical union seems to have been consummated.

The position of *Egypt* [was until 1914] exceedingly anomalous. There can be no doubt that by the letter of international documents it was constituted a part-sovereign state under the suzerainty of Turkey; but there can also be no doubt that the real authority in the last resort was vested, not in the Sultan but, in the government of Great Britain. The country was for centuries a province of the Ottoman Empire. In 1831 its ruler, Mehemet Ali, revolted against the Sultan. After some years of successful warfare he was on the point of taking Constantinople, when the Great Powers interfered and compelled him to restore the larger part of his conquests. But by the Quadruple Treaty of 1840, and the Sultan's Firman of June, 1841, Egypt was erected into an hereditary pashalic under the rule of Mehemet Ali and his descendants; and by these and subsequent concessions the title of Khedive was conferred upon the ruler of the country, and he obtained many of the rights of a sovereign prince. He could maintain an army, contract loans, and make non-political Conventions with foreign powers; and though by the Firman of 1879 the number of Egyptian soldiers was limited to eighteen thousand, and a few other restrictions were imposed upon Tewfik Pasha, the then Khedive, he was left in possession of many of the powers of external sovereignty. The state-paper suzerainty of the Porte was practically set aside, owing to the power exercised over Egyptian affairs, first by England and France acting together, and then, after the withdrawal of France from active coöperation in 1882, by England acting alone. After Great Britain had put down in that year the revolt of Arabi Pasha, Egypt was occupied by British troops, and the country was governed

under British advice.[1] But for sixteen years its southern provinces, called the Egyptian Soudan, were overwhelmed by a flood of dervish fanaticism and maintained a barbarous independence. The Soudan was, however, reconquered by an Anglo-Egyptian army, which in 1898 overthrew the tyranny of the Khalifa in a great battle at Omdurman. By a Convention between Great Britain and Egypt, dated January 19, 1899, the recovered provinces were placed under the *condominium* of the two countries, and they have been administered ever since by a Governor General appointed by Egypt with the advice and consent of the British government. Great Britain pledged herself before her occupation of Egypt to withdraw as soon as she had restored the finances and created a satisfactory native administration. But events have so increased her responsibilities that her retirement would bring ruin on the country.[2] Her position was regularized by an agreement with France, under date April 8, 1904,[3] and its subsequent recognition by other powers. Thus friendly coöperation took the place of distrust and intrigue, and a happy ending was put to a period of dangerous tension. According to the classification we have adopted, Egypt was undoubtedly a client state. The difficulty was to find its patron. Was it Turkey, the state-paper suzerain, or Great Britain, the guiding and controlling power? [Shortly after the outbreak of war with Turkey, in 1914, Great Britain declared a protectorate over Egypt, and the termination of Turkey's suzerainty. The Khedive, who had adhered to the enemies of Great Britain, was deposed, and Prince Hussein Kamel Pasha, the eldest living prince of the family of Mehemet Ali, became his successor, but with the changed title of Sultan of Egypt. The restriction on the number of the Egyptian army was removed. Great Britain accepted the fullest responsibility for the defence of the Sultan's territories. Foreign relations between the Sultan and powers other than Great Britain were to be conducted through His Majesty's

[1] Holland, *European Concert in the Eastern Question*, ch. IV.

[2] Debate in House of Commons, Aug. 10, 1882, *Hansard*, 3d Series, vol. CCLXXIII; Speech of Lord Salisbury at Mansion House, Nov. 9, 1898.

[3] *Supplement to American Journal of International Law*, vol. I, pp. 6–8.

representative in Cairo. These and other arrangements were of course made at the time without the consent of Turkey, which, however, was obtained in the treaty of peace with her signed August 10, 1920, but still unratified; nor had they the sanction of other powers interested, except such as was tacitly given by the allies of Great Britain in the great war. However, the treaties of peace, after that war, with Germany,[1] Austria,[2] Bulgaria,[3] and Hungary,[4] respectively exclude those states from any right of intervention in the matter; all the other powers chiefly interested in Egypt were signatories to one or other of these treaties, except Russia. In 1919, Great Britain officially announced that her policy in Egypt is to preserve the autonomy of that country under British protection and to develop the system of self-government under an Egyptian ruler.[5] For various political reasons there followed an unfortunate delay in carrying out these plans. It was only after serious riots by the extremists of the Egyptian nationalist party had been suppressed and martial law had been proclaimed that Great Britain made a fresh declaration of policy in March, 1922. The principle underlying this is that the protectorate of 1914 must be ended, and that Egypt shall be free to work out such national institutions as may be best suited to the aspirations of her people. But the peculiar geographical position of Egypt makes it necessary to safeguard British interests there; and this is effected by reserving absolutely to the discretion of the British government (a) the security of the communications of the British Empire in Egypt; (b) the defence of Egypt against all foreign aggression. The British Prime Minister stated emphatically in the House of Commons that the British government would regard as an unfriendly act any attempt at interference in the affairs of Egypt by another power, and would consider any aggression against Egyptian territory to be repelled by all the means at its command; (c) the protection of foreign interests in Egypt and

[1] [Art. 147–148.]

[2] [Art. 102–103.]

[3] [Art. 63.]

[4] [Art. 86.]

[5] [*Journal of Comparative Legislation* (New Series), vol. XVII, part III, pp. 238–259; *Statesman's Year Book* (1920), pp. 252–253.]

of minorities; (d) the Sudan; this is not to be allowed to relapse into its evil plight before the Mahdist movement was crushed. And no change in its status is to be allowed which will imperil the security of the millions of British capital invested there.[1]]

The *Papacy* is the next of our anomalies. Till 1870 the Pope was a temporal sovereign. In that year an Italian army occupied Rome, which was immediately added to the kingdom of Italy and made its capital. The Papal States disappeared from the map, and the Pope ceased to be in fact a reigning monarch, though he still retained his vast spiritual authority. In 1871 the Italian Parliament defined his position by a statute called the Law of Guarantees, against which the occupants of the papal chair have never ceased to protest. They have, however, availed themselves of some of the privileges accorded to them by it, though none of them has ever touched the large annual sum set apart therein for the upkeep of their palaces and the maintenance of their diplomatic staff.

On the one hand, the Pope is no longer the head of a state. Though no officer of the Italian kingdom may enter his dwelling without his consent, yet his houses are not his own and his attendants are not his subjects. He may negotiate concordats, but they are not treaties. His agents abroad, and the agents he receives from foreign states, enjoy diplomatic immunities, but they are not diplomatic envoys. They deal with the affairs of a church, and not with international intercourse. On the other hand, the honors belonging to sovereigns are accorded to the Pope. His person is inviolable. He has more than once in recent times acted as mediator and arbitrator in international disputes, though his representatives were refused admission to the Hague Conferences. Some non-Roman Catholic powers, like Great Britain and Germany, send envoys to him, though they do not receive representatives from him. It is quite true that most of the privileges and immunities he possesses are conferred by the Law of Guarantees. But it is equally true that, if they were withdrawn, many states would be likely to interfere diplomatically, and some perhaps by force of arms. An Italian statute cannot

[1] [*Times* Newspaper, March 1, 1922.]

confer international personality; but the tacit consent of a large number of states to treat a given prelate as if he possessed some of the attributes of an international person puts him in a very different position from that of an ordinary individual.[1] The position in question is undefinable. From the point of view of International Law the Papacy is incapable of classification. It cannot be recognized as a member of the society of nations, nor can it be ignored altogether. But the insuperable difficulties connected with it are a testimony to the strength of moral and spiritual influences in a sphere where we are sometimes told only brute force counts in the last resort. [Whether the Pope's position alters when Italy is at war seems to be an open question. It has been pointed out that, while the Law of Guarantees does not differentiate between war and peace, yet military reasons might compel Italy to restrict the freedom of communication with the entire Catholic world which the Pope enjoys under that Law.[2] If this were not so, Italy would be at the mercy of any spy who could abuse the Papal privilege in time of war. When Italy in 1915 joined in the great war, she gave the Austrian, Prussian, and Bavarian envoys to the Pope, express permission to remain in her territory, but they withdrew to neutral territory by the order of their governments. Italy then arranged for the transmission of Papal communications with the German territories by special couriers to the Swiss frontier, and thence by telegrams.[3]]

[The *League of Nations* created in 1919 may be described as a subject of International Law and an international person distinct from the several states composing it. But it is "an international person *sui generis*, something not to be likened to anything else."[4] The great war was ended by a Treaty of Peace with Germany, in the forefront of which is the Covenant of the League of Nations, signed or afterwards acceded to by every

[1] Nys, *Droit International*, vol. II, pp. 311–323; Despagnet, *Droit International Public*, §§ 147–164; Pearce Higgins, Article in *Journal of the Society of Comparative Legislation*, New Series, vol. IX, pp. 252–264.

[2] [Oppenheim, *International Law*, vol. I, § 106*a*.]

[3] [*Revue Générale de Droit International*, vol. XXIV, pp. 244–255. *Journal du Droit International* (1915), pp. 304–305. See also § 130 *post*.]

[4] [Oppenheim, *International Law*, vol. I, § 167*c*.]

power in the world of any importance, except China, Russia, and defeated Germany and her allies. The United States of America did not, however, ratify the Treaty. The composition and functions of the League of Nations thus formed are treated fully elsewhere.[1] The only facts which we need here anticipate are that the League's action is to be effected through an Assembly and a Council, both which are composed of representatives of the states which are members of the League, and a permanent Secretariat; that the seat of the League is at Geneva; that the Council shall meet once a year at least; and that the aims of the League are, broadly, to secure international peace and coöperation. The members guarantee against external aggression the territorial integrity and the independence of one another. No member of the League is to resort to war with any other member without first submitting the dispute to arbitration or to inquiry by the Council, and even then not until three months have elapsed from the award by the arbitrators, or the report by the Council. Disregard of these peace insurance provisions by any member is an act of war against all other members of the League, and they undertake to sever all relations with the defaulter. In pursuance of another Article of the Covenant, a Permanent Court of International Justice was created in September, 1921. Scarcely less important than these peace provisions are the undertakings of the League to attempt the improvement of labor conditions, to secure freedom of communications and equitable commercial treatment of all its members, and to take steps for the prevention of disease. At first sight, the League might appear to be nothing but an alliance between its members. But it goes far beyond that, for its Assembly, Council, and Secretariat give it a personality separate from that of its members either collectively or individually. On the other hand the League falls far short of a super-state, and no worse service could be done to it, than to claim for it anything of the kind. In fact, its framers expressly deny any such intention and are content with the comment that it is "a solemn agreement between sovereign states, which consent to limit their complete freedom of action

[1] [See § 221*a*.]

on certain points for the greater good of themselves and the world at large." [1] Nor is the League a *Staatenbund*,[2] for loose as the authority of the central body in a *Staatenbund* may be, yet it is still an authority and as such has compulsory powers over its member states; whereas the Assembly, the Council and the Secretariat (which may be styled for this purpose the central body of the League) have no compulsory control over any member of it, except in the single case of a member resorting to war in violation of its obligations with respect to peaceful settlement of the dispute. Much less is the League a *Bundesstaat*, or federal union,[3] and, at its present stage of development only those "who know everything about the higher politics except that Europe is not America, and the Supreme Court of the United States is not a pattern that can be reproduced to order" will regret that it is not.[4] The League of Nations, then, is an anomalous international person. Can it be reckoned as a state? Apparently not, for it has no territory peculiarly its own and no subjects over which it can rule. It is not a sovereign body, though it possesses some of the rights exercisable by sovereign states; e.g., it governs through a Commission the Saar Basin, and exercises a protectorate over the Free City of Danzig.[5] We cannot make any of the existing *formulae* of classification cover it, and there is every reason to rejoice that we cannot; for the League of Nations is a living organism changing perhaps under our eyes and not to be carved or racked on the bed of this or that scientific definition. A useful parallel is suggested by our own legal history. In England under Henry II, the King devised legal remedies in his own court as an alternative to the open fighting by which the powerful barons settled their disputes about land. And he did this with scarcely any national government worth the name at his back, without any standing army, police, or public opinion to help him. What the internal condition of England was then, the condition of the body of civilized states is now, and what an

[1] [*Covenant of the League of Nations with a Commentary thereon*, Parl. Papers, 1919, Cmd. 151.]

[2] [See §§ 37, 40.]

[3] [*Ibid.*]

[4] [Pollock, *League of Nations*, p. 94.]

[5] Oppenheim, *International Law*, vol. I, § 167*c*.

English King did in the twelfth century for the internal peace of his realm, the League of Nations is beginning to do now for the welfare of the world. Is it any wiser to apply modern ideas of sovereignty to the League of Nations than to speculate in whom it resided under Henry II? ']

[The Covenant of the League of Nations, 1919, also introduced to International Law the idea of *territories under a mandate*. By the great war Germany lost, among other parts of her dominions, those which lay over-seas, and it was recognized by the Peace Conference that the problem which this raised was not that of a mere division of these as spoils among the victors, but the far wider one of developing the civilization of the backward nations who inhabit them. Accordingly, Article 22 of the Covenant provides that the tutelage of these peoples should be entrusted to advanced nations, whose resources, experience, or geographical position best fit them for this responsibility, and who are willing to undertake it. Such guardian nations become mandatories on behalf of the League of Nations, and are to report annually to the Council of the League. The Permanent Mandatory Commission will examine the report and advise the Council thereon. The character of the mandate is to vary according to circumstances. Article 22 classifies communities that should be put under the charge of a mandatory state, and the mandates applicable to them may be conveniently described as "A," "B," or "C." (A) Those peoples formerly under Turkish rule which are sufficiently advanced to require only the administrative advice of the mandatory until they can stand alone. Thus France has mandates for Syria and the Lebanon, and Great Britain for Palestine and for Mesopotamia (now Iraq). In the autumn of 1921, Iraq became a separate state with the Emir Feisal as King, and the function of the British representative is to give him advice, and not to rule his country. (B) Peoples like those of Central Africa. Here the mandatory itself must administer the territory, subject to such conditions as the maintenance of public order and the prevention of abuses like the slave trade. Examples of "B" mandates occur in former

[1] *British Year Book of International Law* (1920–1921), pp 35–44.

German East Africa under Great Britain and Belgium. (C) Territories like South-West Africa and some South Pacific Islands which are so small or so far distant from the centres of civilization that the mandatory must govern them as its own, subject to the safeguards for the native population mentioned in (B). "C" mandates are illustrated by former German South-West Africa of which the Union of South Africa became the mandatory in 1919, Samoa which has been taken over by New Zealand, former German New Guinea by Australia, and the former German Pacific Islands north of the equator (including Yap) by Japan. Three legal ideas borrowed from private law seem to be interwoven in the conception of a mandate in International Law. The first is the Roman Law *mandatum*, as shown in the fixing of the exact terms of the mandate on each particular occasion, instead of allowing them to depend on a general rule of law; and in the gratuitous nature of the relation, at least in class "A" mandates. The second is the duty of a tutor to his ward, and it should be noted here that in French law tutory is regarded as a species of mandate.[1] The third is a vague idea of trusteeship, though certainly not very clearly conceived or easily distinguishable from that of tutory.

Though the mandatory states are responsible to the League of Nations, it is not the League which appoints them, but the Principal Allied and Associated Powers, for it was they who acquired in the first instance the territories that were later transferred to the mandatory states. The original title of these Powers was based on the treaties of peace which ended the great war, or, in the case of Turkish territory (unless the treaty of peace with Turkey be ratified), on conquest.[2] A puzzling question is where state sovereignty resides with respect to territories under mandates. Is it in the League of Nations, or the mandatory authority, or the territory under the mandate; or is it shared between all or any two of these? A practical turn would be given to the problem if the mandatory authority (or, where such is the fact, one of several states

[1] Baudry-Lacantinière, *Précis de Droit Civil*, vol. I, § 983.

[2] *British Year Book of International Law* (1921–1922), pp. 48–56, 109–121, 163–165.

constituting it) were at war with another state. Must the territory under the mandate be deemed hostile or neutral? This could not be answered without determining the point as to sovereignty, and it is suggested that the best line of solution is to consider in each particular case under which of the above classes, (A), (B), or (C), the territory falls, and the exact terms of the mandate.[1]]

## § 44

Admission into international society—States hitherto deemed alien in civilization and ideas.

Modern International Law grew up among the states of Europe in the sixteenth and seventeenth centuries. Their influence helped to mould it. There never was a time when they were outside its pale. They formed the nucleus of international society, and there was no need for them to be formally admitted into it.[2] But when other states desired to enter it and come under the rules it had adopted, a necessity for formal reception arose. Practices grew up and soon hardened into custom, till now we find that the admission of new international persons takes place in three different sets of circumstances.

The first occurs when a state of another civilization or a state hitherto accounted barbarous is received into the family of nations. This was the case with Turkey, when by the Treaty of Paris of 1856 she was "admitted to participate in the advantages of the public law and system of Europe."[3] With more or less of formality and completeness, Persia, China, and Japan have been accorded a similar recognition. As we have already seen, the possession of a fixed territory and a certain size and importance are essential to membership in the family of nations. A further requisite is that the state to be admitted shall be to some extent civilized after the European model; but the exact amount of civilization required cannot be defined beforehand. Each case must be judged on its own merits by the powers who deal with it; and it is clear that they would not admit a state into their society if they did not deem it suffi-

[1] [Cf. *American Journal of International Law*, vol. XIII, pp. 639–640.]

[2] Lawrence, *International Problems and Hague Conferences*, pp. 24–35.

[3] Holland, *European Concert in the Eastern Question*, p. 245.

ciently like to themselves in organization and ideas to be able to observe the rules they have laid down for their mutual intercourse.

§ 45

Another case of admission is exemplified when a new body politic formed by civilized men in districts hitherto left to nature or to savage tribes is recognized as an independent state. The history of the Transvaal, or South African Republic, affords an excellent example. In 1836 a number of Dutch farmers left Cape Colony and went into the wilds of South Africa. Some settled in the district now known as the colony of Natal, and set up a rudimentary form of civilized government. On the absorption of this territory by the British Empire they again moved, and joining another section of the original emigrants who had made their home in the interior, established themselves in the upland country beyond the river Vaal. In 1852 they were dealt with by Great Britain as an independent state, or rather series of states; for the various communities did not unite into one whole till 1864. Other powers followed the British lead, and till 1877 the Boer republic was an international person in the fullest sense of the word.[1] Subsequent events led to a peaceful annexation, a revolt, the establishment of what was called British suzerainty, a war, and finally the extinction of the republic. The Peace of Vereeniging of May 31, 1902, marked the end of the struggle and the union of the Transvaal territory with the British Empire. A further example is to be found in the creation and recognition of the Congo Free State, which was founded by the International Association of the Congo, a philanthropic society under the direction of the King of the Belgians, who for some years provided the funds necessary to carry on its operations. These were directed towards the formation of civilized settlements in the vast area of the Congo basin, for the purpose of combating the slave trade and opening up the country to legitimate and peaceful commerce. Treaties were made between the Asso-

States formed by civilized men in hitherto uncivilized countries.

[1] Bryce, *Impressions of South Africa*, ch. XI.

ciation and numerous native tribes, whereby it acquired an enormous territory, with a population estimated at 17,000,000 souls. Its boundaries received definition in a series of Conventions and Declarations negotiated in 1884 and 1885 with the various states represented at the West African Conference of Berlin. The Association was thereby turned into an international person, called the Congo Free State, and the signatory powers recognized its independence under the rule of King Leopold II, of Belgium. By the Final Act of the Conference its territory was included in the zone within which all nations were to enjoy complete freedom of trade, and by the same instrument the parties to the Conference bound themselves to respect its neutrality in the event of war, as long as it fulfilled the duties that neutrality requires. The new state thus created has had a chequered history. In 1889 King Leopold executed a will in which he bequeathed his sovereign rights over it to Belgium. Financial difficulties having arisen, it was empowered in 1890 by the signatories of the Final Act of the West African or Congo Conference to levy certain moderate duties on imports for purposes of revenue. Soon after this date, companies, to whom concessions of vast tracts had been made, cruelly exploited the natives in order to benefit their shareholders. After years of agitation, pressure from abroad, and the awakening of a large section of the Belgian people to a sense of the iniquities perpetrated in the name of their king, brought about in 1907 the treaty of cession of the Congo Free State to Belgium. Good has resulted from the efforts made by Belgium, after the death of Leopold II in 1909, to free the Congo peoples from the state of virtual slavery in which large numbers of them lived, and further reforms are promised.[1]

A third instance of the grant of recognition as states to communities of men who have established civilized rule in uncivilized districts is to be found in the history of the Republic of Liberia, originally founded, like the Congo Free State, by a

[1] British Parliamentary Papers, *Africa*, No. 4 (1885); *Supplement to the American Journal of International Law*, vol. III, pp. 5–96; Speech of Sir Edward Grey in House of Commons, May 27, 1909.

voluntary association of individuals leagued together for philanthropic purposes. In this case the association was The American Colonization Society for the Establishment of Free Men of Color of the United States. In 1821 it obtained from the native chiefs the cession of a tract of territory on the coast of Upper Guinea, and sent thither a number of emancipated negroes. Liberally assisted with funds by the American Association, this community grew into an organized state, which in a few years declared itself independent, and in 1847 assumed the title of the Republic of Liberia. Great Britain was the first power to recognize the new state, which she did by negotiating a formal treaty with it in 1848. Since that time other countries have followed her example, and the negro Republic is an undoubted member of the family of nations,[1] though it lives in the midst of difficulties and alarms from which it shows little capacity to extricate itself.[2]

§ 46

The last and most frequent case of admission into the society formed by civilized states occurs when recognition of independence is given to a political community that has cut itself adrift from the body politic to which it formerly belonged and started a separate national existence of its own. The community thus recognized must, of course, possess a fixed territory, within which an organized government rules in civilized fashion, commanding the obedience of its citizens and speaking with authority on their behalf in its dealings with other states. The act of recognition is a normal act, quite compatible with the maintenance of peaceful intercourse with the mother-country, if it is not performed till the contest is either actually or virtually over in favor of the new community. Thus the recognition of the independence of the United States by those powers who accorded it after Great Britain had herself recognized them as independent by the preliminaries of 1782 was no unfriendly act towards her; but

States whose independence is recognized in consequence of separation from some other state.

[1] Twiss, *Law of Nations*, Preface to second edition.

[2] *American Journal of International Law*, vol. IV, pp. 529–545.

their recognition by France in 1778, when the contest was at its height and the event exceedingly doubtful, was an act of intervention which the parent state had a right to resent, as she did, by war. Again, when the independence of the revolted Spanish-American colonies was recognized by Great Britain, Spain had no cause to complain of any breach of international right, because no recognition was accorded in any case till she had ceased from serious efforts to restore her supremacy, though on paper she still asserted her claims. Recognition was given first to Buenos Ayres in 1824, and at that time the contest had lasted for twenty years and the colony had been free from Spanish rule for fourteen years. The case of Texas and its recognition by the United States is somewhat similar. In 1836 the revolted Texans not only defeated the Mexican army at San Jacinto, but took the Mexican President prisoner. The further attempts of Mexico to regain her authority were absolutely impotent, and the contest was over when the United States recognized the Texan republic in 1837.[1] But undoubtedly political necessities or national sympathies will sometimes hasten a recognition, as when the United States in 1903 recognized the independence of Panama less than a fortnight after she had cut herself adrift from the republic of Colombia, and five days after the recognition signed a treaty with her, providing facilities which Colombia had refused for the construction of a canal between the Atlantic and the Pacific by the American government.[2] Moreover, we must not hastily conclude that, because most creations of a new state by separation involve the use of force, therefore none have been carried out peacefully. The contrary is proved by the quiet recognition of the independence of Brazil by King John VI of Portugal in 1825, and the bloodless separation of Norway from Sweden in 1905.

[1] Historicus, *Three Letters on Recognition;* Moore, *International Law Digest*, vol. I, pp. 72–119.

[2] Moore, *International Law Digest*, vol. III, pp. 53, 55, 261.

§ 47

The various methods of recognition of independence.

Recognition may take place in various ways. Sometimes a formal declaration of recognition is made in a separate and independent document, and it was in this way that the United States recognized the Congo Free State in 1884.[1] Sometimes such a declaration is embodied in a treaty that deals with other matters also, as was done when Germany recognized the same state in the same year;[2] [and again when she recognized in the Treaty of Peace, 1919, the resuscitated state of Poland, the new Czecho-Slovak state, and the independence of all the territories, which were part of the former Russian Empire on August 1, 1914. So too, Austria recognized in her Treaty of Peace, 1919, the new Serb-Croat-Slovene state]. Occasionally the recognition is made conditional, as when the independence of Roumania, Servia, and Montenegro was recognized in the Treaty of Berlin of 1878 on the condition that they imposed no religious disabilities on any of their subjects.[3] Recognition may be effected, without the use of words directly according it, by entering into such relations with the recognized community as are held to subsist between independent states alone. Thus there is no formal statement of recognition in the Treaty of Amity and Commerce between France and the United States in 1778; but the independence of the revolted colonies is taken for granted in every article, and they covenant again and again to do what can be done only by sovereign states.[4] The sending of a duly accredited diplomatic representative, as was done by the United States in the case of Texas, has the same effect as the negotiation of a treaty. Both are acts of sovereignty, and to perform them towards an aspirant for admission into the family of nations implies that, as far as the state that does them is concerned, its desire is granted. Recognition by one state in no way binds others. But the example, once set, must soon be followed, unless the newly recognized community

[1] *Supplement to the American Journal of International Law*, vol. III, pp. 5, 6. [2] British Parliamentary Papers, *Africa*, No. 4 (1885), pp. 263–264.

[3] Holland, *European Concert in the Eastern Question*, pp. 293–303.

[4] *Treaties of the United States*, pp. 296–305.

loses almost immediately its *de facto* independence, or is so small and unimportant as to be neglected with impunity. The quickness or slowness of recognition is often determined by political sympathies; but no power can continue for an indefinite time to shut its eyes to accomplished facts. When a province or colony has won a real independence, recognition of it must come sooner or later, even from the parent state. The lead in these matters is usually taken by the government of some influential country. Sometimes the Great Powers of Europe acting together in concert agree upon recognition, as when they admitted Turkey to participate in the advantages of public law in 1856, or gratified the national aspirations of the Balkan States in 1878. In these cases the smaller states followed the example of their more powerful neighbors.

§ 48

Considered as members of the society of nations, states are corporate bodies acting through their governments. Each state is bound by engagements entered into by its rulers on its behalf, as long as they are not made in open violation of its own law and constitution. Other states have no right to dictate what individual or body in a state shall conduct its external affairs. They must transact their business with those who are legally designated for the purpose. All they have a right to demand is that there shall be some one who can speak on behalf of their fellow-state and make for it engagements that it regards as binding.

Continuity of state life.

The continuity of a state is not affected by changes in the form of its government or alterations, whether by gain or loss, in the area of its territory. Whether it be empire, kingdom, and republic in turn, or whether it remain one of these for centuries, it is the same international person throughout. Other powers almost always recognize a new form of government in an old-established state, in order that they may continue to do business with it. If they refuse such recognition, no official intercourse is possible till such time as they change their policy. But the state-person remains throughout. It does not cease to exist because it is ignored.

A state does, however, lose its corporate existence when it is obliterated as a subject of International Law, whether by absorption in another state like the Transvaal republic or Texas, or by entering with other states into a federal union as did the Swiss Cantons in 1848, or by splitting up into several states as did the original republic of Colombia, which divided itself in 1832 into Venezuela, Ecuador, and New Granada, this last becoming in 1863 the present republic of Colombia, from which Panama split off in 1903. Further, the formation of an incorporate union or a real union involves the extinction of the international personalities of the states that compose it, and the substitution for them of the new international personality which they have combined to form. Moreover, there are other changes which, though they do not bring state existence to an end, alter its character materially. Thus, when a sovereign state becomes a part-sovereign state, or a state of the ordinary type accepts permanent neutralization, or the same changes take place, but in the reverse order, the state survives, though its nature is modified to a very considerable extent.[1]

## § 49

State succession.

By *state succession* is meant the substitution of one state for another, the successor continuing to enjoy the rights and discharge the obligations of its predecessor. The idea of succession in the sense of substitution was derived from Roman Law, by which the heir took up the *persona* of the deceased and stepped into all his legal clothing. Publicists from Grotius[2] onwards have adopted this idea and endeavored to introduce into International Law principles and rules derived from the *Corpus Juris Civilis*. But inasmuch as a state differs widely from an individual, and in cases of cession the ceding state still exists to make the conditions of transfer a matter of bargaining, it results that a successor state never occupies the exact legal position of its predecessor. Consequently, the attempt to

[1] Rivier, *Droit des Gens*, vol. I, pp. 65–69.

[2] *De Jure Belli ac Pacis*, bk. II, ch. IX.

apply to it legal theories based on the assumption that it does leads to much confusion. Rules are stated only to be modified. Technicality is set against technicality; and under a deceptive appearance of strict legal reasoning a vast amount of doubt and disagreement lies concealed. It would be much better to abandon the technicalities, and fill the place of deductions from them with constant references to the practice of states. To some extent this has been done already; but to do it thoroughly would require a bulky volume based on long and toilsome research. And the end would be that a few admitted principles and a few accepted rules would emerge from the mass of cases. Much of what remained would be a mere chaos of conflicting instances. But here and there it would be possible to discern a tendency which might in time prevail and produce a new rule. All we can do here is to deal very briefly, first, with completed conquest, and afterwards with the cession by one state to another of a portion of its territory. Under each head we shall have to speak of both persons and things.

When a state absorbs bodily all the territory of a conquered enemy, the vanquished state disappears as an international person. Its subjects become subjects of the conqueror, if they continue to reside on the transferred soil. But if they leave the territory immediately, or were not in it when the transfer took place, and do not return to it for a permanent stay, their position is doubtful. It has been held in some cases that such persons were subjects of the conqueror; but the tendency in recent times is to regard them as belonging to any foreign state where they have become naturalized. Citizens of their original state they cannot be, since it has ceased to exist.[1]

With regard to property, it is undoubted law that the conqueror takes all the assets of the vanquished state or belligerent community. The question whether it also takes all the debts and is bound to perform the contracts of the extinguished international person is doubtful, though the current of opinion seems to be running in the direction of an affirmative answer. Still the Transvaal Concessions Commissioners

[1] Despagnet, *Droit International Public*, §§ 322–327; Westlake, *International Law*, part I, pp. 69–71; Cogordan, *La Nationalité*, pp. 300–340.

appointed by the British Government in 1900 stated in the Introduction to their Report that "a state which has annexed another is not legally bound by any contracts made by the state which has ceased to exist." But the weight of authority in England seems to be against them;[1] and they themselves qualify their uncompromising dictum in the passages that immediately follow it. They admit that "the modern usage of nations has tended in the direction of the acknowledgment of such contracts," and express approval of the view that "the obligations of the annexed state towards private persons should be respected," with certain qualifications, the most important of which is that "an annexing state would be justified in refusing to recognize obligations incurred by the annexed state for the immediate purposes of war against itself." In fact, they based the recommendations of their report on the principle of the protection of every one in the possession and enjoyment of rights duly acquired on conditions duly performed.[2] Thus the practice of Great Britain on this occasion supports the doctrine that the successor state takes over along with the property of the extinct state its debts and obligations. Some jurists hold that this extends even to debts incurred for the purpose of carrying on the war in which the conquest was made.[3] But while human nature remains what it is we can hardly expect the victors to make good the sums advanced in order, if possible, to secure their defeat. Another point still disputed is whether the obligation to pay debts extends beyond the assets received.[4] The treaties of the extinct state die with it, except in so far as they have defined the boundaries of the transferred territory, or created rights in or over it, such as a right of fishing in its waters or a right of transit over its railways. On the other hand, the treaties of the annexing state apply to the annexed state.[5] It goes almost without

[1] See Westlake, *International Law*, part 1, pp. 81–83; Hall, *International Law*, 7th ed., § 29 note; Oppenheim, *International Law*, vol. 1, § 82.

[2] British Parliamentary Papers, *South Africa*, 1901, Cd. 623, pp. 6–8.

[3] Oppenheim, *International Law*, vol. 1, § 82.

[4] Westlake, *International Law*, part 1, pp. 75–78.

[5] Despagnet, *Droit International Public*, § 97; Westlake, *International Law*, part 1, pp. 59–62, 66–68.

saying that among civilized states conquest makes no difference in the private rights and duties of individual citizens. [Another case of the extinction of a state occurs where, instead of being annexed by another state, it breaks up into several new states. Much the same principles apply here as in annexation. It seems that the burden of the defunct state's debts must be borne proportionately by the new states, or by the other successor in title to the territories of the old state. The Austro-Hungarian Empire disappeared in consequence of the great war, and its territories either split up into a number of new states or were annexed by other states. The pre-war debt of the Empire was apportioned by the Treaties of Peace among these new or annexing states, but liability for the bonded war debt of the extinct Empire remained with Austria.][1]

Much that has been said about the transfer of a state completely by conquest applies to the transfer of a portion of a state by cession. But there is this great difference, that in the latter case there is still an international person left to negotiate the terms of the surrender, to receive the allegiance of such of its subjects in the transferred territory as desire to retain their original nationality, to enjoy the rights and fulfil the obligations of its treaties, and to claim from the victor the performance of such duties as it deems to be imposed on him in respect of persons and things in the territories he has acquired. Change of nationality is of course involved in every case of cession. The inhabitants of the ceded territory become subjects of the state to which it is ceded. But a practice of allowing them to retain their original nationality if they will leave the ceded territory began with the capitulation of Arras in 1640 and the transfer of Strasburg in 1697, a time being set, generally a year, within which a choice must be made. The grant of a permission to this effect has since become a regular stipulation in treaties of cession. It was at first accompanied by the condition that those who chose the alternative of departure must sell their lands and houses in the transferred territory; but there has been only one survival of this severity in recent times. Option has been given so constantly that it

[1] Oppenheim, *International Law*, vol. I, § 83.

might fairly be claimed as a right, even if a treaty of cession contained no article granting it in express terms, or in the rare cases when there was no treaty of cession, but only a silent acceptance on the part of the dispossessed state of the fact of conquest. Many difficulties have arisen as to details. Does the change of allegiance, and by consequence the liberty of option, apply to those subjects of the ceding state who were domiciled in the ceded territory at the time of the transfer, or to those who were born in it? Does the right of option belong to married women and minors, or is their nationality to be determined for them by their husbands and fathers? If minors are to choose for themselves, will their time of option be extended till they reach years of discretion? To these and similar questions no definite answers can be given on general principles. It is desirable that every treaty of cession should contain explicit rules concerning them, [and this was the case with the Treaties of Peace after the great war.][2]

With regard to state property and state obligations, much of what has been said in connection with entire absorption applies to cession. But in the latter case such matters as assumption of state debt, and liability for the performance of state contracts, are dealt with almost invariably in the treaty between the losing and the acquiring power. The principle that finds most favor with modern jurists is that the successor state should assume the local debt of the ceded territory, and discharge the local obligations legally contracted with regard to it by the predecessor state. It is also maintained that an equitable share of the general debt should be transferred along with the district that changes hands. But this has been done in a few cases only, notably when the new sovereign wished to stand well in the eyes of the world, as did Italy when in 1860 it made itself responsible for a part of the papal debt on taking over a part of the papal dominions. [Again, when Italy acquired Tripoli in 1912 after a war with Turkey, the treaty of peace transferred to her a portion of the

[1] Cogordan, *La Nationalité*, pp. 300–346; Westlake, *International Law*, part I, pp. 71–74; Despagnet, *Droit International Public*, §§ 322–327.

[2] [Oppenheim, *International Law*, vol. I, § 219.]

Turkish debt, and it was provided by the Treaty of Peace with Germany in 1919 that the states acquiring German territory should in general be responsible for a part of the pre-war debt of the German Empire and also of the German state to which the territory acquired had belonged.][1] But in 1898 the United States refused to burden itself with the debt charged on Cuba by Spain, nor would she allow the Cuban government to be saddled with it. And in 1905 no share of the Russian debt passed to Japan along with the southern part of the island of Sakhalin, which was ceded by Russia with "all public works and properties thereon." Transferred territory in passing from state to state leaves behind one network of international rights and duties, and enters another. All it can be said to take with it are its local rights, local obligations, and local possessions.[2]

[1] Art. 254.

[2] Westlake, *International Law*, part I, pp. 60–63, 78–81; Hall, *International Law*, 7th ed., § 28; Takahashi, *International Law applied to the Russo-Japanese War*, p. 775.

# CHAPTER IV

## THE SOURCES OF INTERNATIONAL LAW

### § 50

WE must have a clear idea of what we mean by the expression *sources of law* before we can discuss what are the sources of International Law. A source of a river is the place whence it issues as a stream,—a lake, or a fountain rising from the surface of the earth. If we followed this analogy strictly, we should say that the source of a given rule of law would be the place where it is first found. But the rule might first be found in the form of a suggestion, a mere proposal put forth in the hope that it would obtain acceptance; and in this stage it would not be true law. Law must indeed be formulated, but it must also receive authority, whereas a river needs only to come forth into the light of day in order to be a river, whether men want it or not. If we take the source of a law to mean its beginning as law, clothed with all the authority required to give it binding force, then in regard to international affairs there is but one source of law, and that is the consent of nations. This consent may be either tacit or express. The first is shown by custom; that is to say, the habitual observance of certain rules of conduct by states in their mutual dealings, though they have not solemnly bound themselves in words to do so. Express consent is given by means of treaties, or international documents having the force of treaties, when such instruments set forth rules of conduct which the signatory powers undertake to observe in future.[1]

The meaning of the phrase *the sources of International Law.*

If, on the other hand, we take the sources of International Law to be the places where its rules are first found, whether in an authoritative or an unauthoritative form, we must enter into an historical enquiry, and this we propose to do without

[1] Oppenheim, *International Law*, vol. I, §§ 15–19.

committing ourselves to a dogmatic opinion as to which of the two senses of the phrase *source of law* is the more proper. Our enquiry has nothing to do with the reason why the rules were originally invented or accepted. We need not stop to enquire whether those who first set them forth or obeyed them did so because of their conformity with a supposed law of nature or because of their obvious utility, whether they were actuated by motives of benevolence or by motives of self-interest. Doubtless considerations of various degrees of respectability have presided over the making of the complex mass of rules we call International Law. But our object here is to trace the process of formation, not to enter into the mental and moral predilections of those who took part in it. And we must never forget that no rule can have authority as law unless it has been generally accepted by civilized states. Custom is, as it were, the filter bed through which all that comes from the fountains must pass before it reaches the main stream. We have to take the rules we find in operation to-day and trace them back to the places where they have their origin. In doing so we shall find that the sources of International Law, in the sense we are now considering, may be resolved into five.

§ 51

First among the sources of our science must be reckoned

1. *The works of great publicists.*

Works of great publicists.

From the time of Gentilis and Grotius down to the present day there has been a long series of able writers, whose works have influenced the practice of states and whose published opinions are appealed to in international controversies. They occupy a position analogous to that of the great institutional writers on Common Law. That is to say, their views are quoted and treated with respect in disputed cases, but are not necessarily decisive. In international controversies the longer the chain of authorities in support of any particular contention, the nearer the approach to unanimity in the opinions of jurists of recognized position, the more likely it is that their judgment will prevail. Where there

are two opposing schools of thought, a quotation from one author of repute can always be capped by one from another expressed in a contrary sense. But a nation that should disregard a general consensus of opinion, in which its own publicists joined, would be held to be acting in a high-handed and aggressive manner. The value of the works of the great international jurists is by no means confined to the settlement of points that are so far doubtful as to afford matter for controversy. Many rules of undoubted validity were first introduced into the law of nations by them. We have but to take up one of the chapters in which Grotius pleads on behalf of his *temperamenta belli* in order to find stated there, for the first time as regards their international application, a number of humane precepts which have since become the commonplaces of belligerent theory and practice.[1] It is almost impossible to estimate how much of the present law of occupation and jurisdiction is derived from principles introduced by the Spanish casuists and Protestant civilians who first applied the rules of Roman Law to the international problems raised by the discovery of the New World. The extent of a state's territorial waters to-day is decided to a great extent by views to which Bynkershoek gave currency early in the eighteenth century;[2] and the work of Vattel two generations later supplied rule after rule for the rapidly growing law of neutrality.[3] With him the great formative influence of the publicists ceased. International Law had by no means taken its final shape. Indeed, there can be no finality about it while the complex society of nations is a living and growing reality. But the moulding influences passed into other hands. For two centuries the development of the law of nations had been the work of great thinkers and writers. It now became the task of statesmen and lawyers. It was not that the publicist had ceased to be useful. On the contrary, the need for him was as great as ever. But whereas his function had been mainly formative in the past, he was for the future mainly to systematize and arrange, to reduce to principle and render consistent

[1] *De Jure Belli ac Pacis*, bk. III, chs. XI–XVI.

[2] *De Dominio Maris* (1702).

[3] *Droit des Gens*, bk. III, §§ 103–135.

with themselves the rules evolved from controversies between states or laid down in the practice of law courts. And general consent testifies that the work has been well done. A long array of great names adorns the annals of international jurisprudence, and among them the publicists of Great Britain and the United States find an honored place. A race that has produced Kent and Wheaton, and Manning and Phillimore, and Dana and Twiss, not to mention a host of others still alive, has done no ignoble service in the cause of peace and justice. Since the middle of the eighteenth century great additions have been made to the rules that govern the intercourse of states; and the services of jurists in sifting and arranging the new matter have been invaluable. They have produced order from chaos and made International Law into a science, instead of a shapeless mass of undigested and sometimes inconsistent rules. And in most cases their impartiality has been as remarkable as their industry in collecting facts and their power of classification in coördinating them. National bias has not been altogether absent; but it has been kept under severe control, and the organization of the *Institut de Droit International*, the International Law Association and the American Society of International Law, with their frequent publications and occasional meetings of the leading publicists of all civilized countries, has helped enormously to eliminate passion and prejudice from the discussion of the problems of state intercourse. There should be something of the judge and something of the philosopher in every writer on International Law. In many the qualities of both are happily combined, and there are very few who degrade themselves to the level of the heated partisan. Doubtful and difficult points are discussed in a scientific spirit as jural problems, and without reference to their bearing on the interests of particular states. Indeed, it often happens that publicists consider questions as to which no international controversy has arisen. The opinions expressed are then of necessity unwarped by national pride or patriotic sentiment; and if states should hereafter differ with regard to the matters in question, the views set forth before the dispute arose will have the merit of absolute impartiality.

§ 52

Next among the sources of International Law we place

*Treaties.*

Till recently there was a wide difference of opinion with regard to their value. On one side, the view was held that they were merely agreements between states for the settlement of current difficulties, and possessed little or no importance in the domain of international jurisprudence. On the other hand, we saw them, or rather a selected number of them, regarded as a sort of sacrosanct repository in which the most fundamental principles and binding rules of the law of nations are to be found. The writers of Great Britain and the United States inclined to the former view. The latter was common among the publicists of the European continent, though few of them would have been prepared to state it in the extreme form it takes in the works of Hautefeuille.[1] But the last two decades have witnessed such a wonderful growth of treaties negotiated for the purpose of making rules binding on all states that the old views and the old controversies have become obsolete, and we are able to put in their place a new and generally accepted account of treaties considered as sources of International Law. We must, of course, distinguish between treaties of different kinds; but our classification will differ somewhat from that of a few years ago.

Treaties.

We will consider first treaties that legislate. These may be divided, to use the phraseology of Oppenheim,[2] into pure law-making treaties and law-making treaties.[3] The first are treaties the object of which is to formulate openly and avowedly rules of conduct which are meant to be binding on the members of the society of nations as a body, or at least on all of them who are directly concerned with the matters referred to in the treaty. The more conspicuous examples of this kind are the three Conventions of the Hague Conference of 1899, and the thirteen Conventions of the Hague Conference of 1907. [A

[1] *Droits des Nations Neutres*, Discours Préliminaire.

[2] *International Law*, vol. I, §§ 18, 19, 492.

[3] See §§ 30–33.

later instance is the International Air Convention, 1919, which is discussed elsewhere.][1] The second are treaties which, like the first, lay down the rules meant to be of general obligation, but, unlike the first, refer to other matters also. Thus the Treaty of Berlin of 1878, in raising Roumania and Servia to the rank of sovereign states and recognizing that Montenegro held a similar position, legislated for the family of nations, and is therefore a law-making treaty; but inasmuch as its provisions were concerned largely with countless details in the arrangements between Turkey and several other powers, it cannot be called a pure law-making treaty. [The Treaty of Versailles, 1919, by which peace was concluded with Germany after the great war, and the various other peace treaties which succeeded it are in the same category. The number of the signatory powers, and the international interest of some of the topics dealt with, show that they are law-making treaties. Among such topics (which will be discussed in their proper place) are the Covenant of the League of Nations, the recognition of several new states, and the regulation of navigation on great rivers, like the Danube.] Both law-making and pure law-making treaties are important; and the multiplication of the latter during the last few years marks the beginning of a new epoch in the history of International Law. We have now a statute book of the law of nations, and it will soon enter on its second volume. Most of it is taken up with the Hague Conventions; and doubtless its successors will be filled in the main with the enactments of the successive gatherings of the quasi-legislative body we call the Hague Conference. But they do not supply all its contents. Whenever representatives from a considerable number of states meet together and draw up a body of rules to which they invite the adhesion of other powers, they produce a legislative act, provided that the hoped-for adhesions are received or tacit consent is given by moulding practice on the model set forth in the document. This was the case with the Declaration of Paris, 1856, on maritime law [at any rate till 1914. The effect of the great war upon it will be dealt with later].[2] Another case occurs when all the powers

[1] [See § 73.]

[2] [§ 243.]

directly concerned in an important question, or series of questions, settle it by mutual agreement, and other states make no objection at the time and conform to the arrangements arrived at in their subsequent practice. This happened with regard to the vast regions of Central Africa in 1885. The fourteen powers represented at the West African or Congo Conference provided for complete liberty of commerce in the Congo basin and prohibition of the sale and transport of slaves therein, freedom of navigation in the Congo and the Niger and their branches, the neutrality under certain conditions of the territories comprised in the conventional basin of the Congo.[1] Other states have since recognized the provisions made for these objects by conforming to them and accepting the benefits conferred by them. The Final Act of the Congo Conference is therefore a pure law-making treaty, though its list of signatures is not so imposing as those which appear at the foot of the Final Acts of the two Hague Conferences. [It was revised by a Convention signed at St. Germain-en-Laye, September 10, 1919, by the United States of America, Belgium, the British Empire, France, Italy, Japan, and Portugal. This almost entirely abrogates as between these powers the Final Act of 1885, but the provisions which it substitutes for the latter are on broader lines similar to the Act. No reference is made, however, to the neutrality of the territories in the basin of the Congo.[2] The treaties of peace after the great war contain undertakings by Germany, Austria, Bulgaria, Hungary, and Turkey, respectively to accept this Convention.] General usage has consecrated what partial agreement introduced [in the Final Act of the West African Conference, 1885]; and the quiescent attitude of states entirely unconnected with Central African affairs must be interpreted into an otiose assent. It constantly happens that small and comparatively uninfluential states tacitly accept the arrangements made by great and important powers. The doctrine that a state cannot be bound without its own consent is true only if we accept as a corollary the proposition that

[1] British Parliamentary Papers, *Africa*, No. 4 (1885), pp. 304–313; *Supplement to the American Journal of International Law*, vol. III, pp. 7–25.

[2] [*State Papers. Treaty Series*, 1919, No. 18, Cmd. 477.]

assent may be evidenced by silent acquiescence as well as by express words. And even then we have to remember that the requirement of universal assent as a condition precedent to the validity of an international statute must be interpreted somewhat loosely. If a few small states not specially interested in some important matter stood out obstinately against an otherwise universal agreement upon it, the agreement would nevertheless be true law for the society of nations. [A recent law-making treaty is the Convention for Control of Trade in Arms and Ammunition,[1] signed at St. Germain-en-Laye, September, 1919, by twenty-three powers allied or associated during the great war. As the powers against whom they fought are bound by their respective treaties of peace to observe the Convention, and as the Convention itself is open to the accession of other member states of the League of Nations besides the signatory powers, it has a world-wide importance. It was designed to prevent the danger to peace which must have ensued if the enormous armaments accumulated by the belligerents in the great war had been indiscriminately dispersed. By Article 1, the signatory powers undertake to prohibit altogether the export of specified arms and of ammunition for the use of such arms, except under licenses which are only to be granted to meet the requirements of governments. By Article 2, there is a further undertaking to prohibit the export of firearms and ammunition (other than arms and munitions of war) to certain areas, except under licenses which are not to be granted unless the granting authority is satisfied that the arms or ammunition are not intended for export or for disposal contrary to the Convention. The areas specified include Africa (except Algeria, Libya, and the Union of South Africa), the islands situated within 100 miles of the coast, Transcaucasia, Persia, Gwadar, the Arabian Peninsula, Turkey in Asia as it was in 1914, and a maritime zone which includes the Red Sea, the Gulf of Aden, the Persian Gulf, and the Sea of Oman. Within this zone, a right to visit suspected native vessels is allowed. By Article 6, there is an undertaking to prohibit, except under licenses, the importation of arms and ammunition specified in Articles 1 and

[1] [*State Papers. Treaty Series.* No. 12 (1919). Cmd. 414.]

2 into the areas mentioned. Article 5 provides for the establishment of a Central International Office under the control of the League of Nations for the collection of documents of all kinds exchanged by the contracting parties with regard to the trade in arms specified in the Convention, and for receiving annual reports from them. The Convention is to be revised at the end of seven years, if this course is recommended by the Council of the League of Nations. Therefore its object cannot be regarded as merely that of getting rid of a temporary evil incidental to a world war, but rather as ancillary to the wider aim of making unnecessary wars difficult in the future.]

[The Conference held at Washington, in 1921, between representatives of Great Britain, France, Italy, the United States of America, and Japan, resulted in several treaties. The importance of three of these can scarcely be overrated. The first, signed on December 13, 1921, by the representatives of the British Empire, France, the United States of America, and Japan, provided for the preservation of the general peace and the maintenance of the rights of these states in relation to their insular dominions in the Pacific Ocean. True, it is primarily concerned with these powers only, but it is such a great factor in the peaceful settlement of possible disputes as to territories where their influence is preponderant that it must rank as a law-making treaty. The second treaty, signed on February 6, 1922, stipulates for a proportionate reduction in the naval shipbuilding programmes of the British Empire, France, Italy, the United States of America, and Japan. It is to remain in force for ten years, and puts such a salutary check on the insane race for naval superiority with its attendant economic burdens and risk of aggressive wars, that it must also be reckoned as a law-making treaty. The third, signed on the same date and between the same powers dealt with the protection of the lives of neutrals and non-combatants at sea in time of war by (*inter alia*) putting unrestricted submarine warfare on the level of piracy; and with the use of gas in war. All these treaties are considered in detail later.][1]

[1] [See §§ 205, 221; and *Parliamentary Papers*. Misc. No. 1 (1922). Cmd. 1627.]

Treaties declaratory of International Law require some consideration. They are law-making in so far as they are really declaratory; for he who resolves a doubt as to the true meaning of a rule does in reality make a rule. But they are very rare, unless we include among them the portions of important law-making documents which do no more than put into formal words observances previously adopted in practice by the most advanced nations. This was the case in many of the Hague Conventions, notably those which set forth a code for the regulation of war on land. The [unratified] Declaration of London of 1909 also, in elaborating a law of blockade and contraband, gave form and precision to many rules which most of the powers concerned had maintained beforehand to be true International Law. The separation of the declaratory portions of these instruments from the rest would serve no useful purpose, while causing great confusion and opening the way to endless controversies. But there have been a few treaties and parts of treaties which openly claimed to be declaratory. Such were the Conventions of the Armed Neutralities of 1780 and 1800.[1] To a considerable extent they were what they purported to be, but not entirely; for among the rules they laid down were some known to be inconsistent with established practice which were introduced in order to curtail the belligerent rights of Great Britain. A curious case of what we may call an attempt at semi-declaratory legislation is afforded by the sixth and seventh articles of the Treaty of Washington of 1871.[2] The three rules laid down in them to guide the arbitrators who were to decide on what were known generically as the *Alabama* claims were held by the United States to have been in force when the acts and omissions complained of took place, while the British Government declined to admit this view, but for the sake of an amicable settlement expressed its willingness to be judged by them as if they had been part of International Law when the alleged offences took place. The two powers agreed to observe the rules as between themselves in future, and to bring them to the knowledge of other maritime powers with a view to

[1] C. de Martens, *Recueil*, vol. I, pp. 193, 194, and vol. II, pp. 215–219.

[2] *Treaties of the United States*, p. 481.

their universal acceptance. This was never done, partly because disagreements arose as to the meaning of several clauses, and partly because it became known that some of the most important of the states to be approached would decline to accept the rules.[1] The case remains on record to show that one party to a treaty may regard an article in it as declaratory, while the other holds that it enunciates new rules. The difficulties of this type of legislation are neither small nor few. But it is sometimes useful to throw important changes into the declaratory form in order to enable states to avoid the appearance of surrendering views they have previously maintained.

The next class of treaties we have to consider consists of those which stipulate avowedly for a new rule or rules between the contracting parties. They are signed by two or three states only, and are meant to establish in their mutual intercourse some principle of action not in general use. Thus they are evidence of what International Law is not, rather than of what it is; for if the rules they lay down had been embodied in it, there would have been no need of special stipulations in order to obtain the benefit of them. The Treaty of 1785 between the United States and Prussia contains an agreement of the kind under consideration. By the thirteenth article the contracting powers declared that in case one was at war while the other was at peace, the belligerent would not confiscate contraband goods carried by a vessel of the neutral, but would be content to detain them instead.[2] The common law of nations gives the right of confiscation, as the negotiators on both sides well knew. And because they knew it, they entered into stipulations to override the ordinary rule and substitute for it one that they preferred. It is clear that treaties of this kind are not sources of International Law. Only in one case can they become so, and that is when the new rule first introduced by one of them works so well in practice that other states adopt it. If they take it up one by one till all observe it, the first treaty in which it appears is its source, though a long interval of time may separate its original appearance from its final

[1] Moore, *International Arbitrations*, vol. I, pp. 666–670.

[2] *Treaties of the United States*, p. 903.

triumph. An instance of this is to be found in the history of the famous rule *free ships, free goods*. The first treaty between Christian powers which contains it was negotiated between Spain and the Netherlands in 1650;[1] and is therefore its source, though the rule was obliged to wait two centuries before it received, in the Declaration of Paris of 1856, such general acceptance as to make it [at least until the recent great war[2]] part and parcel of the public law of the civilized world.

The last and most numerous class of treaties consists of those which contain no rules of international conduct, but simply settle the matters in dispute between the parties to them. Most diplomatic instruments belong to this class, for as a rule when states come to negotiate they are far more intent upon getting rid of present difficulties than laying down rules and doctrines for the future. It is obvious that treaties negotiated in this spirit do not affect International Law at all, and are not intended to do so.

When we speak of treaties we must be understood to mean separate articles as well as entire documents. Most international instruments contain stipulations on more matters than one, and important treaties generally deal with a variety of subjects. One of them may, therefore, afford examples of two or more of the classes just described. In going through these classes we have seen that within recent years there has been built up by treaty a body of rules that bear a close analogy to statutory law.

§ 53

We now pass on to deal with

*The decisions of prize courts, international conferences, and arbitral tribunals,*

considered as sources of International Law. Prize courts are tribunals set up by belligerent states for the purpose of deciding upon the validity of the captures made by their cruisers. They are supposed to administer International Law, and they do so unless the properly constituted authorities of their own

[1] Dumont, *Corps Diplomatique*, vol. VI, part I, p. 571.

[2] [See § 243.]

states order them instead to carry into effect rules inconsistent therewith.[1] Such interferences are fortunately rare; and accordingly it happens that the decisions of prize courts are respected in proportion to the reputation for learning, ability, and impartiality enjoyed by their judges. Those who preside over these courts have to remember that International Law has no locality, and must strive to divest themselves of all prepossessions in favor of their own country. As one of the most distinguished of them said, when trying a case in which the claims of Great Britain as a belligerent came into sharp conflict with the claims of Sweden as a neutral, "It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances; and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character."[2] This high standard has not always been reached; but some of the great ornaments of the bench have attained to it, and by their legal acumen, joined with their undoubted impartiality, have enriched the literature of International Law with a series of profound judgments which are quoted with respect wherever competent scholars discuss the rights and duties of civilized states. The names of Story the American, Stowell the Englishman, and Portalis the Frenchman, will live as long as the law of nations endures. Most of the cases which come before prize courts require nothing more for their solution than the application of well-known and universally accepted rules; but occasionally a new point arises, and then the decision of a great judge may become a source of International Law. At the moment he does no more than determine the case before him; but the justice and reasonableness of the rules he lays down may lead to their acceptance by other courts and in other countries, and thus in time they become incorporated

Decisions of prize-courts, international conferences, and arbitral tribunals.

[1] [Cf. *The Zamora*. L. R. [1916] 2 A. C. at pp. 91–92.]

[2] Lord Stowell's Judgment in the case of the *Maria;* see C. Robinson, *Admiralty Reports*, vol. I, p. 340.

into International Law. When a highly trained intellect, after hearing and reading carefully sifted evidence, and listening to the arguments of able counsel, applies recognized principles to new circumstances, the result is not unlikely to be a rule of practice that stands the test of time and proves to be of universal application. It was thus that the doctrine of continuous voyages was introduced into International Law. Lord Stowell first invented it to meet the case of neutral vessels which, in the war between Great Britain and Revolutionary and Imperialist France, had endeavored to evade a prohibition to engage in the enemy's carrying trade by interposing a neutral port between their point of departure and the forbidden destination. Whatever may be thought of the original attempt to curtail the area of neutral mercantile activity, there can be no doubt that the doctrine of Lord Stowell was sound in so far as it was concerned with the actual transit of ships engaged in a clearly unlawful trade.

The activity of prize courts is expended for the most part upon questions of pure maritime law. But international conferences and arbitral tribunals deal with any matters that are referred to them, and their decisions may, therefore, embrace subjects wholly removed from the sea and the affairs connected with it. Thus the decision of Marshal MacMahon, given in 1875, as arbitrator in the dispute between Great Britain and Portugal with regard to Delagoa Bay, did much to clear up a difficult point in the law of occupation,[1] and the decisions of the West African Conference of 1884–1885, upon the notifications to be given to one another by the parties to it of any fresh acquisition of African territory by occupation [tended to develop] into a general rule of International Law.[1]

§ 54

Next among the sources of International Law come

*International state papers other than treaties.*

Treaties are national acts of a specially deliberate and solemn kind, and are rightly placed in a class by themselves. But

[1] See § 74.

other state papers may be important as sources of International Law. Questions at issue between states are often discussed in them with conspicuous learning and ability, and occasionally an international controversy clears up a disputed legal point or advances the application of principles that have before received little more than an otiose assent. Thus the Silesian Loan Controversy between Great Britain and Prussia in the middle of the eighteenth century [1] placed beyond possibility of doubt the rule that a state cannot make reprisals upon money lent to it by private persons belonging to another country. And again, the stand taken by the United States Government first in 1793 in favor of a wide interpretation and strict enforcement of its own neutrality obligations,[2] and afterwards, half a century ago, against a somewhat loose interpretation of the duties of neutrality by Great Britain in the case of the *Alabama* and her sister cruisers,[3] has led to a great increase in the strictness with which the principle of absolute impartiality, conceded on paper but till recently not very closely adhered to in practice, has been applied to the conduct of neutral states. The controversies attending the formation, progress, and dissolution of the two great leagues known as the Armed Neutralities of 1780 and 1800 [4] threw almost as much light on the question of neutral rights, as the *Alabama* controversy and the action of Washington in his second administration did on the question of neutral duties. Many state papers are from a legal point of view worthless; others have but a temporary and evanescent value. But now and again some master mind produces a document or series of documents that change the whole course of international relations and become sources of law. Further, it must be remembered that numerous questions arise between states which are never heard of outside the walls of foreign offices. Either they are too simple to admit of doubt, or they are at once referred to the law officers of the governments concerned, whose opinion, given officially but not published at the time, if ever, is taken as conclusive and acted upon immedi-

State papers other than treaties.

[1] See § 174. [2] See § 223. [3] See § 239.

[4] Manning, *Law of Nations*, bk. v, ch. vi.

ately. In this way International Law is always undergoing a process, not so much of formation as of crystallization. Floating ideas harden into definite rules, or one of two opposite views receives almost imperceptibly the consecration of practice.

§ 55

The last of the classes into which we divide the sources of International Law may be described as

*Instructions issued by states for the guidance of their own officers and tribunals.*

We have not considered these documents under the previous head, because they are of a domestic character, and are not drawn up with a view to any controversy between states. But though they have no other object than the regulation of the conduct of the agents and servants of the government that issues them, they may have a far wider effect than was intended or expected by their authors. When drawn by skilled jurists, they sometimes decide knotty points in a manner which proves so valuable in practice that other states adopt it. The French Marine Ordinance of 1681 dealt with the then nebulous and uncertain subject of prize law in a masterly manner. It was commented on by Valin in 1760, and from it Lord Stowell borrowed freely in his judgments on maritime cases. Thus what was originally intended as a guide to French cruisers and French tribunals became in time, and as to some of its provisions, a source of International Law. The Instructions for the Guidance of the Armies of the United States in the Field, issued in 1863, have attained a similar position. They have been referred to and quoted with great respect in many treatises,[1] several states have issued corresponding manuals, and the Hague Code for the regulation of war on land owes much to them.

Instructions issued by states for the guidance of their own officers and tribunals.

We have now been through the various sources of International Law. We see that any national act whereby a state signifies its desire to adopt a given general rule may become a

[1] *E.g.* Maine, *International Law*, p. 24.

source of law provided that the rule in question is a new one. If it wins assent it becomes a part of International Law. If it fails to be adopted in practice, it is but a pious opinion, however excellent it may be in itself. But universal obedience is not meant when we speak of general assent. Many rules of International Law have been violated on one pretext or another by states that fully acknowledged their validity. No law can expect to be always obeyed, least of all a law that has no physical force at its back to compel submission and punish disobedience. But though International Law is in this predicament, it is also true that flagrant and stubborn disregard of its well-established precepts is rare. States on the whole show a praiseworthy willingness to govern their conduct towards one another by rules to which they have given an express or tacit consent.

§ 56

Divisions of International Law. The old divisions useless. A new one suggested.

From the sources of International Law we pass to its divisions. There is no subject on which the publicists of the seventeenth and eighteenth centuries are more at variance with one another than this. Grotius, as we have seen,[1] distinguished between a natural and a voluntary law of nations. His successors discussed at length the relations of natural law to International Law, and their distinctions and conditions multiplied as each one commented upon the opinions of his predecessors. A process of simplification began early in the nineteenth century; but even Wheaton, who wrote in 1836, accepts the distinction between a natural and a voluntary law of nations, and argues that the voluntary law is a genus, comprising the two species of conventional law introduced by treaty, and customary law derived from usage.[2] But, like other writers, he forgets or ignores these distinctions when he sets forth the actual rules of his science. Divisions that do not divide are useless; and in the present case some of them are mischievous as well, for they imply a belief in the theory that by some process of reasoning or intuition a law can be evolved which is

[1] See § 27.

[2] *International Law*, § 9.

binding on states apart from their consent, and thus tend to revive the old confusion between what is and what ought to be. Instead of attempting the unprofitable task of distinguishing the rules of International Law according to their origin, we will divide the subject into heads according to the different kinds of rights possessed by states and their corresponding obligations.

If we make our attempt at division on the lines just indicated, we shall find at once that states possess, by virtue of the law they have created for themselves, certain rights and obligations in their ordinary condition of peace, and that certain other rights and obligations are obtained, in addition to or in qualification of these, when a state is in the condition of belligerency or neutrality. Fortunately, in the modern world, peace is regarded as the usual and proper condition for nations. No writer would now venture to say with Machiavelli, "A prince is to have no other design, or thought, or study, but war, and the art and discipline of it."[1] We have come to regard the business of good government as the most important art of rulers and to include in it the practice of all honorable means of avoiding war. The rights and obligations which belong to states in their capacity of members of the family of nations are connected with peace and the state of peace. They may be called normal rights and obligations and they are possessed by every independent state which is a subject of International Law. Just as the law of the land clothes every child born under its authority with certain rights which are his through no act of his own, so International Law gives to the states under its authority certain rights which belong to them through the mere fact of subjection to it. And just as an individual can, by the exercise of his will, place himself in a position whereby he acquires rights and obligations he did not possess before, so a state can, by an act of corporate volition, place itself in a position whereby it acquires rights and obligations it did not possess before. No man, for instance, can marry without making up his mind to do so; and no state can go to war or remain neutral in a war between other states with-

[1] *The Prince*, ch. XIV.

out making up its mind to do so. But if a man does enter into matrimony, he acquires rights that did not belong to him as a mere subject and citizen, and comes under obligations that were not binding upon him in his previous condition; and if a state becomes a belligerent or a neutral, it acquires rights and becomes liable to obligations of which it knew nothing as a mere subject of International Law. A belligerent, for example, has, in the right of search, a power over neutral vessels it could not exercise in its ordinary condition of peace;[1] and its obligation to submit to restrictions upon the freedom of its cruisers to stay in the ports of friendly powers and buy what things they please there, modifies a previously existing right of unrestricted purchase.[2] Those rights and obligations which a state possesses as a belligerent or a neutral we may call abnormal, to distinguish them from the normal rights and obligations that belong to it as a subject of International Law. And this distinction is fundamental. It gives us our first great division, and is the pivot on which our whole classification turns.

§ 57

Starting, then, with the normal rights and obligations of states, we find that they are concerned with independence, property, jurisdiction, equality, and diplomacy. Each of these gives us an important subject fairly well marked off from other subjects, and capable of being treated by itself as a distinct head. The rules of International Law group themselves under these heads in a convenient manner without much overlapping; and we thus obtain a means of dividing one portion of our subject into titles or chapters in a way that shows the relation of its various parts to one another and to the whole. The other great division, that of the abnormal rights and obligations of states, naturally falls under two heads,—those of belligerency and neutrality. But each of these involves the fact of war and deals with it in a different light, the first from the point of view of those who are

Normal rights and obligations are connected with independence, property, jurisdiction, equality, and diplomacy; abnormal rights and obligations with war and neutrality.

[1] See § 186.

[2] See § 232.

engaged in it, and the second from the point of view of those who are abstaining from it. It is impossible to review either head without taking more space for its consideration than is assigned to any one of the subjects enumerated in connection with normal rights and obligations. We shall, therefore, subdivide each of the two when we come to deal with them in detail. Here it will be sufficient to remark that, since normal rights and obligations are connected with peace, we obtain a division of International Law into the Law of Peace, the Law of Belligerency, and the Law of Neutrality, each of which will be considered in one of the three following parts of this book. The subjoined table will enable the student to see at a glance the arrangement we propose to adopt.

INTERNATIONAL LAW

| | | |
|---|---|---|
| Normal rights and obligations of states. | (1) Rights and obligations connected with Independence. | Law of Peace. |
| | (2) Rights and obligations connected with Property. | |
| | (3) Rights and obligations connected with Jurisdiction. | |
| | (4) Rights and obligations connected with Equality. | |
| | (5) Rights and obligations connected with Diplomacy. | |
| Abnormal rights and obligations of states. | (1) Rights and obligations connected with Belligerency. | Law of Belligerency. |
| | (2) Rights and obligations connected with Neutrality. | Law of Neutrality. |

# PART II—THE LAW OF PEACE

## CHAPTER I

### RIGHTS AND OBLIGATIONS CONNECTED WITH INDEPENDENCE

§ 58

Definition and nature of the right of independence.

INDEPENDENCE may be defined as *the right of a state to manage all its affairs, whether external or internal, without control from other states.* This right of independent action is the natural result of sovereignty; it is, in fact, sovereignty looked at from the point of view of other nations. When a state is entirely its own master, it is sovereign as regards itself, independent as regards others. Independence is, therefore, predicated by modern International Law of all the sovereign states who are its subjects.

It must not, however, be forgotten that till the downfall of the mediaeval order the notion of universal sovereignty was the dominant conception in the minds of thinkers and writers on international relations. They held that there was, or at least that there ought to be, a common superior over nations. The last lingering remnants of this idea were shattered in the storms of the Reformation, and the doctrine of the independence of states was substituted for it by the great jurists to whom we owe the form that International Law has assumed in modern times. There is a tendency on the part of many writers to regard independence and sovereignty as attributes of states, conferred on them in some mysterious manner, quite apart from the provisions of the law that defines their rights and obligations. We are told that they spring from the nature of the society existing among nations, that they are necessary to the conception of a state, or that they are conferred by the Great Author of society. Such speculations are shown to be baseless by a simple reference to the facts of history. States, like individuals, have the rights conferred on them by the law

under which they live. There was a time when their full sovereignty was denied by the law then existing. But since the Peace of Westphalia of 1648, the principle of complete independence has been accepted by statesmen, and embodied in the international code of the civilized world.

§ 59

Part-sovereign states not fully independent.

Part-sovereign states do not possess the right of independence to the full, though to save appearances they are sometimes spoken of in diplomatic documents as independent. But it is clear that limitations on their external sovereignty are also limitations on their independence. For instance, by Article 4 of the Treaty of February 27, 1884, the Transvaal republic of South Africa agreed to make no treaty with any state or nation, other than the Orange Free State, nor with any native tribe east or west of the republic, without the approval of Great Britain. Inasmuch, therefore, as the rulers of the Transvaal were bound to obtain the assent of Great Britain before they could take effective action in a most important sphere, the Boer republic could not, in strictness, be said to possess the full rights of independence, though it was called an independent state in treaties and despatches, and the term suzerainty, which had appeared in the Convention of 1882, had not been inserted in its successor of 1884. In the negotiations preceding the final rupture with Great Britain in 1899 the South African republic claimed to be "a sovereign international state," which it certainly was not if, as we have been arguing, restrictions on external sovereignty are also restrictions on independence.

§ 60

Even in the case of fully sovereign states, and in regard to the conduct of the most powerful among them, restrictions upon unlimited freedom of action are imposed temporarily by events and circumstances; but since they are not permanent legal incidents of the political existence of the communities subjected to them, but are in the main necessary conditions of social life imposed by the good sense of the powers concerned,

they do not detract from the independence and sovereignty of the states that live under them. They often spring from treaty stipulations entered into voluntarily by governments to avoid difficulties in their future intercourse. For example, the United States and Great Britain bound themselves by the Clayton-Bulwer Treaty of 1850, which was abrogated and superseded by the Hay-Pauncefote Treaty of 1901, to acquire no territory in Central America;[1] and in 1886 Great Britain and Germany made a formal declaration whereby the limits of their respective spheres of influence in the Western Pacific were defined, and each power pledged itself not to intrude into the region assigned to the other.[2] And again the Declarations made in 1907 by Great Britain, France and Spain, as to the maintenance of the territorial *status quo* of these three powers in the Mediterranean, and the similar Declaration made in 1908 by the powers bordering on the Baltic and the North Sea, partake of the nature of self-denying ordinances, since they pledge their signatories to refrain from disturbing the existing frontiers in the district to which they apply.[3]

Voluntary restrictions upon the freedom of action of sovereign states.

Another source of self-imposed restrictions upon the freedom of action granted by the right of independence is to be found in consideration for the corresponding right of other states. Just as in the society formed by individuals, friendly intercourse would be impossible, if each insisted upon using the full freedom secured to him by law without regard to the feelings and convenience of his neighbors, so in the society of nations a similar abstinence is necessary, if peace and harmony are to be preserved. Mutual concession is the price paid for social life. A state that conducted its foreign policy, regulated its commerce, and exercised its jurisdiction without thought or care for the wishes and interests of other states, would doubtless be within its strict right as an independent political community; but it would soon discover that it was regarded as an inter-

[1] *Treaties of the United States*, p. 441.

[2] British Parliamentary Papers, *Western Pacific*, No. 1 (1886).

[3] *Supplement to the American Journal of International Law*, vol. I, p. 425, and vol. II, pp. 270–274.

national nuisance and subjected to an exceedingly unpleasant process of retaliation.

§ 61

Involuntary restrictions upon the freedom of action of sovereign states.

Sometimes an independent state finds itself obliged to submit for a while to restraints imposed upon it by superior force, as when Prussia was forbidden by Napoleon in 1808 to keep up an army of more than 40,000 men,[1] and Russia and Turkey were compelled by the Treaty of Paris of 1856 not to build "military-maritime arsenals" on the coast of the Black Sea, and not to maintain ships of war thereon.[2] Such stipulations as these are not uncommon in the history of international transactions. They are frequently imposed on a defeated belligerent as part of the price of peace. The powers subjected to them constantly evade them, and always take the first opportunity of throwing them off. Prussia foiled Napoleon's design of keeping her powerless as a military state by passing the pick of her able-bodied young men through her small army and keeping them trained in a reserve force; and Russia took advantage of the Franco-Prussian War of 1870 to obtain by the Convention of London of 1871 a formal release from her engagements as to the Black Sea.[3] Such limited and temporary restraints upon the freedom of action of a state are not held to derogate from its independence. They are passing incidents in its career, not permanent legal conditions of its existence. And the same thing may be said of the authority assumed by the Great Powers of Europe in the Old World and the United States on the American continent. There can be no doubt that the Great Powers have, on several occasions, acted in the name and on behalf of all Europe,[4] and that the smaller states have willingly or unwillingly accepted the arrangements made by them. In America a position of primacy has been assumed by the United States. But occasional deference to the will of one or

[1] Fyffe, *Modern Europe*, vol. I, p. 382.

[2] Holland, *European Concert in the Eastern Question*, p. 247.

[3] Holland, *European Concert in the Eastern Question*, p. 273. [See also the severe restrictions placed on defeated Germany by the Treaty of Versailles, 1919, Part V.]

[4] See §§ 113, 115.

the other of these authorities does not deprive a state of its independent position under the law of nations.

§ 62

Intervention — its essential characteristics.

The right of independence conferred by International Law upon each fully sovereign member of the family of nations involves, as we have seen, complete liberty on the part of every state to manage its affairs according to its own wishes. It may change its form of government, alter its constitution, form its alliances, and enter upon its wars, according to its own views of what is just and expedient. But sometimes it happens that another state, or a group of states, interferes with its proceedings, and endeavors to compel it to do something which, if left to itself, it would not do, or refrain from doing something which, if left to itself, it would do. Interference of this kind is called intervention. [The term would have much more technical value, and the exposition of the ideas which it represents would be clearer if it were recognized that it has three distinct meanings: — (a) Interference by one state between disputing sections of the community in another state, the matter of dispute being usually, but not necessarily, some constitutional change. This is by far the commonest sense, and might be styled *internal intervention*. (b) Interference by one state in the relations — generally the hostile relations — of other states. This is usually called *external intervention*. (c) A punitive measure adopted by one state against another in order to compel the latter to observe its treaty engagements or to redress some breach of law which it has committed. This might be styled *punitive intervention*. The importance of this classification lies in the fact that it does not merely distinguish three kinds of the same thing but refers to three quite different things, which for historical and etymological reasons happen to have acquired the same name. The only really appropriate matter for discussion under "Intervention" in the Law of Peace is *internal* intervention. *Punitive* intervention should be relegated to "Methods of redress falling short of war," [1] like Em-

[1] [See §§ 136–138.]

bargo, and Pacific Blockade. In fact such intervention often has taken the form of Pacific Blockade. As to *external* intervention, it is doubtful whether it has, as such, any logical place at all in modern International Law. As has been indicated, the typical example of it is where state A takes part, or threatens to take part, in a war actual or pending between states B and C. Is the action of state A really within the region of International Law at all? It can remain neutral or join in the war as it thinks fit. If it joined in the war for no reason whatever, or if its entry therein were a palpable breach of law, International Law would condemn it, but beyond that it could not go; for modern International Law does not profess to classify the causes of war. In fact it would puzzle even a moralist or a theologian to say whether some of the bloodiest wars in modern history were right or wrong.][1] Let us first distinguish intervention from other forms of interference that might possibly be confounded with it; and having done this, we shall then be in a position to discuss whether it is ever justifiable, and, if so, in what circumstances.

The essence of intervention is force, or the threat of force in case the dictates of the intervening power are disregarded. It is, therefore, clearly differentiated from mere advice or good offices tendered by a friendly state without any idea of compulsion, from mediation entered upon by a third power at the request of the parties to the dispute, but without any promise on their part to accept the terms suggested or any intention on its part to force them to do so, and from arbitration, which takes place when the contestants agree to refer the dispute to an independent tribunal and consent beforehand to abide by its award, though it possesses no power to compel obedience to its decisions. There can be no intervention without, on the one hand, the presence of force, naked or veiled, and on the other hand, the absence of consent on the part of both the combatants. There have been instances where one party to the dispute has asked for the intervention of a third power; but if both parties agree in such a request, the interference ceases to be

[1] [See § 135, and Winfield in *British Year Book of International Law* (1922–1923), pp. 130-149.]

intervention and becomes mediation. Should the mediating state find the parties unwilling to accept its proposals and decide to compel them by force of arms, its action would then lose the character of peaceful mediation and assume that of warlike intervention.

§ 63

General considerations with regard to intervention.

There are few questions in the whole range of International Law more difficult than those connected with the legality of intervention, and few that have been treated in a more unsatisfactory manner. An appeal to the practice of states is useless; for not only have different states acted on different principles, but the action of the same state at one time has been irreconcilable with its action at another. On this subject history speaks with a medley of discordant voices, and the facts of international intercourse give no clue to the rules of International Law. We might, indeed, deem that the search for rules of any kind was hopeless, were it not that it is possible to infer certain clear and unmistakable precepts from fundamentals admitted on all sides. No one doubts the existence of the right of independence, or the duty of self-preservation, and from these we are able by a process of deduction to obtain what we are seeking. When practice is diverse, the only thing left is an appeal to first principles, which may at least give us moral precepts, even when it fails to supply us with legal rules.

§ 64

Intervention in pursuance of a legal right to intervene.

In most cases the question of intervention is a question of policy. But there are exceptional circumstances in which it is a matter of legal right, as Oppenheim points out,[1] though the right is sometimes merely technical and not susceptible of exercise without moral wrong. Strict legality can be claimed for

*Interventions in pursuance of a right to intervene given by treaty or by the common law of nations.*

If a state has accepted a guarantee of any of its possessions, or of its reigning family, or of a special form of government,

[1] *International Law*, vol. I, § 135.

it suffers no legal wrong when the guaranteeing state intervenes in pursuance of the stipulations entered into between them, though it may suffer moral wrong when those stipulations are in restraint of functions which it ought to exercise freely, for example, the choice of its rulers. Further, client states are under obligation to submit to such interference and direction as are provided for in the instruments that define the relation between them and their patron states. The intervention, for instance, of the United States in Cuba in 1906 was perfectly legal, as it came well within the terms of the Treaty of Havana, 1903.[1] [It is perhaps to this right to intervene in pursuance of a treaty that the course of action adopted towards Greece by the allied powers, Great Britain, France, and Russia, during 1915–1917, must be referred. By the Treaty of London, 1863, Greece was put under the guarantee of these powers as a "monarchical, independent, and constitutional state." At the outbreak of the great war, in 1914, Greece was neutral, and nominally continued to be so until shortly after the abdication of its King, Constantine, in June, 1917, when it entered the war on the side of Great Britain and her allies; but even at the beginning of the war, in 1914, the great majority of the nation was enthusiastically in favour of the Entente cause, and of giving effect to a treaty with Serbia (an ally of Great Britain, France, and Russia) under which Greece was bound to assist Serbia in the event of war between Serbia and a third power, or of an attack upon her by important Bulgarian forces. Upon both these points, King Constantine was in sharp conflict with his ministry (at the head of which was M. Venizelos) and his subjects. His sympathies were strongly pro-German, and his interpretation of the Serbian treaty was that it applied only if Bulgaria alone attacked Serbia, and not if she did so in combination with other powers, e.g., Austria. Being unable to enforce his views in any other way, the King resorted to thoroughly unconstitutional government which led to the resignation of M. Venizelos in March, 1915, though he resumed office in August of that year. On October 2, 1915, the British and French governments landed

[1] See § 39.

150,000 troops at the Greek port of Salonika. They did this, with the hearty approval of M. Venizelos and of an overwhelming majority of the Greek populace, for the purpose of aiding Serbia, who at that moment was at war with Austria and Germany, though not with Bulgaria whose attitude was nevertheless threatening. But the British and French governments had not the formal consent of the Greek government nor even that of M. Venizelos, who entered a protest against their action as a breach of Greece's neutrality. This complaint was, however, merely a formal one. From this point onwards, until his abdication in 1917, Greece was the prey of further unconstitutional government by the King, by means of which he committed continual breaches of neutrality against Great Britain and her allies. His action was countered by progressively drastic steps on the part of Great Britain, France, and Russia, culminating in demands for the demobilization of the Greek army, the holding of new elections, the surrender of the Greek fleet, and finally the abdication of the King. Such appear to have been the facts on the sources at present available. Can then the conduct of the three powers be justified as a lawful intervention in Greece? An impartial jurist must hesitate long before answering this question. For the facts are not perfectly known, and they were complicated at every turn by political considerations. But there should be little doubt that Great Britain, France, and Russia had a right to intervene under the Treaty of London, cited above, in view of King Constantine's unconstitutional government, to which are traceable all the violations of Greek neutrality which he perpetrated. If this be so, what particular form the intervention took, and whether it constituted an attack on Greece's neutrality, are questions which seem to be irrelevant. Once admit the right of intervention in any particular case, surely the means by which it is carried into effect are not material, unless they are excessive or inhuman. It may also be argued that what seemed to be breaches of Greek neutrality by the three powers were merely acts that Greece would have done or adopted herself if her King had not consistently prevented any constitutional

government from doing them; in other words, if he had not indulged in conduct of the very kind which justified the powers in intervening under the Treaty of London. It remains to add that other acts were done by Great Britain and France on Greek territory during the war which had no reference to the intervention against King Constantine, and which were alleged to be pure breaches of Greek neutrality.][1] Interventions undertaken for the purpose of preventing or ending illegal interventions on the part of another state are lawful, as when in 1866 the United States, by significant references to the possibility of war, caused Napoleon III to withdraw his troops from Mexico. The French expedition had been sent in 1861, along with English and Spanish forces, to compel the payment by the Mexican government of certain pecuniary claims and the redress of other grievances; but Great Britain and Spain withdrew from the enterprise on discovering that France was determined to interfere in the domestic affairs of Mexico. On their departure a French army established the Archduke Maximilian of Austria as Emperor of Mexico; but after its withdrawal he lost in a few months his throne and his life.[2] [Here what began as a lawful punitive intervention by three powers ended as an unlawful internal intervention on the part of one of them.] Interventions by right are clearly lawful; but whether they are just also the circumstances of each case must determine. Certainly they do not violate any right of independence, because the states that suffer them have either conceded a liberty of interference beforehand by treaty, or accepted it as part of the law of the society to which they belong.

[1] [Ion, *The Hellenic Crisis, American Journal of International Law*, vol. XI, pp. 46, 327; vol. XII, pp. 312, 562, 796. *Revue Générale de Droit International*, vol. XXV, pp. 31, 47, 154, 169. Garner, *International Law and the World War*, vol. II, §§ 464–473. Strupp, *La Situation Internationale de la Grèce* (1821–1917).]

[2] Moore, *International Law Digest*, vol. VI, pp. 483–506; Calvo, *Droit International*, §§ 196–204.

§ 65

We now turn to interventions that are technical violations of the right of independence. Therefore no strict legality can be claimed for them, yet in certain circumstances International Law may excuse or even approve of them. The first cases to be considered are

Interventions for which no strict legal right can be claimed — those based on the necessity of self-protection.

*Interventions to ward off imminent danger to the intervening power.*

The right of self-preservation is even more sacred than the duty of respecting the independence of others. If the two clash, a state naturally acts on the former. Nor is the doctrine that self-preservation overrides ordinary rules, peculiar to the law of nations. In every civilized state a woman who slays a man in defence of her honor is accounted blameless, and during invasion the military authorities are allowed to destroy property, if such destruction is necessary for the performance of warlike operations against the enemy. By parity of reasoning we obtain the rule that intervention to ward off imminent danger to the intervening power is justifiable. But we should note carefully that the danger must be direct and immediate, not contingent and remote, and, moreover, it must be sufficiently important in itself to justify the expenditure of blood and treasure in order to repel it. The mere fear that something done by a neighboring state to-day may possibly be dangerous to us in the future if that state should happen to become hostile, is no just ground of intervention. If it were, nations might always be at war to-day to prevent war fifty years hence! Further, the cause that justifies intervention must be important enough to justify war. Governments constantly submit to small inconveniences rather than resort to hostilities; and an evil that is not sufficiently grave to warrant a recourse to the terrible arbitrament of battle is not sufficiently grave to warrant intervention. Moreover, intervention would not be justifiable if the danger could be met in any other way. But inasmuch as the intervening state must

be itself the judge of the necessity of the intervention, there is a tendency for her to magnify dangers in order to justify attacks really due to ambitious aims or unscrupulousness as to means. On the other hand, harsh judgments have sometimes been pronounced against her out of dislike of her policy and dread of her power. Add to these causes of bias, honest differences of opinion, and we shall deem it in no way wonderful that many interventions have been subjects of much controversy both at the time and afterwards. In all probability men will differ as long as International Law is studied, about the seizure of the Danish fleet by Great Britain in 1807[1] and the intervention of the United States between Spain and Cuba in 1898.[2] [It should be noted that self-preservation is not merely a defence to intervention, but must also be regarded more widely as an independent right which, subject to the limits stated, may afford a justification for any infraction of another state's independence. Thus, in 1838, Canadian insurgents seized an island at Niagara within the frontier of the United States of America and made preparations there for crossing into British territory on board a steamer, the *Caroline*. The United States government had shown itself powerless to prevent this hostile invasion, and the British authorities therefore cut the moorings of the *Caroline*, and she drifted over Niagara Falls. The United States government complained, and required Great Britain "to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation," and this the British government was able to do.[3] On the other hand, the allegation of necessity by Germany as a justification for her invasion of Belgium and Luxemburg, in 1914, was quite unsound. Her argument that if she had not abused Belgian neutrality, Great Britain and France would have done so, had no foundation in fact; and it was put forward to conceal her real motive, which was to use

[1] Fyffe, *Modern Europe*, vol. I, pp. 342–345; Westlake, *International Law*, part I, pp. 302–303.

[2] Moore, *International Law Digest*, vol. VI, pp. 105–239.

[3] [Snow's *Cases on International Law*, p. 177. Pitt Cobbett's *Leading Cases on International Law* (4th ed.) vol. I, p. 168.]

Belgium and Luxemburg as the shortest roads to the speedy defeat of France.] [1]

§ 66

The next class of cases for which the permissson and possibly the approval of the law of nations may be claimed is

*Interventions on the ground of humanity.*

In the opinion of some writers such interventions are legal. But we cannot venture to bring them within the ordinary rules of International Law, which does not impose on states the obligation of preventing barbarity on the part of their neighbors. At the same time, it will not condemn interventions for such a cause, if they are undertaken with a single eye to the object in view, and without ulterior considerations of self-interest and ambition. Should the cruelty be so long continued and so revolting that the best instincts of human nature are outraged by it, and should an opportunity arise for bringing it to an end and removing its cause without adding fuel to the fire of the conflict, there is nothing in the law of nations which will brand as a wrongdoer the state that steps forward and undertakes the necessary intervention. Each case must be judged on its merits. There is a great difference between declaring a national act to be legal, and therefore part of the order under which states have consented to live, and allowing it to be morally blameless as an exception to ordinary rules. A state may, in a great emergency, set aside everyday restraints; and neither in its case nor in a corresponding case of individual conduct will blame be incurred. But, nevertheless, the ordinary rule is good for ordinary cases, which, after all, make up at least ninety-nine hundredths of life. To say that it is no rule because it may laudably be ignored once or twice in a generation, is to overturn order in an attempt to exalt virtue. An intervention to put a stop to barbarous and abominable cruelty is a question rather of policy than of law.

Interventions on the ground of humanity.

[1] [Oppenheim, *International Law*, vol. 1, § 133*c*. Hall, *International Law*, 7th ed., § 85*n*.]

It is above and beyond the domain of law.[1] It is destitute of technical legality, but it may be morally right and even praiseworthy to a high degree. When in 1860 the Great Powers of Europe intervened to put a stop to the persecution and massacre of Christians in the district of Mount Lebanon, their proceedings were worthy of commendation, though they could not be brought within the strict letter of the law.[2]

§ 67

From the middle of the seventeenth century it has been a maxim of European diplomacy that

*Interventions in order to preserve the balance of power*

were necessary and just. The significance attached to the theory of a balance of power has varied from time to time. It used to be held that a sort of international equilibrium of forces had been established, and that any state that attempted to destroy its nice adjustments might be attacked by others whose relative importance would be diminished if it were permitted to carry out its projects. For a long time this doctrine was accounted axiomatic. It had only to be stated to be accepted. To preserve the balance of power, states kept up standing armies,[3] entered into wearisome negotiations, and waged incessant wars. And the history of some of these wars furnishes a most complete condemnation of the theory that was invoked to justify them. If, for instance, success had attended the attempt of the allies in the War of the Spanish Succession to seat the Archduke Charles instead of Philip V on the throne of Spain, they would have brought about the very disturbance of the European equilibrium that they took up arms to prevent; for Philip never inherited the French

Interventions for the preservation of the balance of power.

[1] Historicus, *Letters on Some Questions of International Law*, p. 14.

[2] *Cambridge Modern History*, vol. XI, p. 636.

[3] See *Preamble to the old British Mutiny Act:* "And whereas it is adjudged necessary by His Majesty and this present Parliament that a Body of Forces should be continued for the Safety of the United Kingdom, the Defence of the Possessions of His Majesty's Crown, and the Preservation of the Balance of Power in Europe."

kingdom, whereas Charles unexpectedly became emperor in 1711. Had he reigned in Madrid, the Imperial and Spanish crowns would have been united on one head,—a consummation as full of danger to the balance of power as the union of France and Spain under one king. If the Allies had been content to wait for the anticipated peril to become real before they took up arms to avert it, they need not have gone to war at all.[1]

A political system that tends to stereotype the existing order of things in international affairs is fatal to progress. Yet underlying the older theory of the balance of power was always the assumption that the division of territory and authority among the chief states of Europe at any given time was the right and proper division, and must be maintained at all costs. In actual fact, the order which it was sought to preserve was constantly changing. At one period the state of possession established by the Peace of Vienna of 1815 was regarded as sacred, at another the appeal was to the Peace of Utrecht of 1713, at a third to that of Westphalia of 1648. The world moved in spite of the efforts of rulers to keep it stationary, and they had to adjust their schemes to its changes. But in doing so they found in the idea of a balance of power a cloak for ambitious designs. If one state desired to pick a quarrel with another, it was easy to allege that some action on the part of the latter threatened the European equilibrium. Under cover of such an accusation demands for concessions of all kinds could be made. The last development of the balance theory in this direction was due to the ingenuity of the Emperor Napoleon III. He put forth the doctrine that whenever another state was greatly aggrandized, France must have territorial compensation, in order that the relative power of the two nations might remain constant. He obtained the cession of Savoy and Nice in 1860 as compensation for the union of central Italy and Piedmont; but he failed entirely in his efforts to obtain similar territorial compensation for the unification of North Germany in 1866.[2] Prince Bismarck alleged that such

[1] Wheaton, *History of the Law of Nations*, part 1, § 2.
[2] *Cambridge Modern History*, vol. XI, pp. 386–388, 457.

a spirit of German patriotism had been aroused by the victories of Prussia, that it was impossible for him to cede a yard of German territory to France. In saying this, he incidentally laid bare the main defect of the original theory of a balance of power. It distributed provinces and rounded off the boundaries of kingdoms without regard to the wishes of the populations and their affinities of race, religion, and sentiment. It repressed popular movements when they interfered with its calculations. Italian unity and German unity were achieved in spite of it; and it is bound to lose influence as the wishes of peoples become more and more a necessary element in the calculations of rulers. It can be credited with but one good result. It did sometimes act as a restraint upon unscrupulous rulers, as when, in 1668, the Triple Alliance of England, Sweden, and Holland, without firing a shot, caused Louis XIV to renounce for a time his designs upon the Spanish Netherlands. But such satisfactory effects were rather accidental than essential. If would-be plunderers could agree beforehand on a division of the spoil, and contrive to silence the objections of less interested neighbors, their victim would not be saved by any regard for a balance of power which remains unaffected by the transaction. This statement finds ample proof in the history of the three partitions of Poland between Austria, Prussia and Russia. Fortunately for them, the people of the United States have never been brought face to face with an international system based upon the old version of the doctrine of a balance of power. The political circumstances of the New World have prevented the growth of such a system on the American continent, and its importation from Europe has been avoided, owing to the wise policy of successive administrations from that of President Monroe onwards.[1]

But in modern times the theory has taken another form which embodies a great truth and is not so easily perverted to evil as was the original version. As we have seen, the existence of International Law involves the existence of a society of nations. Membership of a society implies social duties, and among them a foremost place is held by the duty of abstaining from con-

[1] Despagnet, *Droit International Public*, §§ 176–182.

duct that endangers the vital interests of the society as a whole. When a member persistently violates this duty, another member or group of members may vindicate social well-being by active measures of restraint. If, therefore, a powerful state frequently endeavors to impose its will on others, and becomes an arrogant dictator when it ought to be content with a fair share of influence and leadership, those who find their remonstrances disregarded and their rights ignored perform valuable service to the whole community when they resort to force in order to reduce the aggressor to its proper position. As the duty of self-preservation justifies intervention to ward off imminent danger to national life or honor, so the duty of preserving international society justifies intervention to bring to an end conduct that imperils the existence or healthful order of that society. It is true that in each case the independence of the offending state is for the moment violated; but the less must give way to the greater in order to attain a good end. Conduct so unsocial as to endanger society may be restrained in the interests of society.[1] But it is not lightly to be assumed that a great advance in the power and wealth of a state will be used to endanger the common weal. Something more than the mere existence of increased resources is necessary in order to justify complaint. It is wise to remember that the power to do evil is harmless unless it is accompanied by the will to do evil. When this last is shown by unmistakable signs, then, but not before, does a case for intervention arise.

§ 68

Inadmissible grounds of intervention.

There are two grounds of intervention that will not bear investigation, though they have been put forward on several occasions. It has been maintained that the request of one of the parties to a civil war justifies a neighboring power in rendering it assistance, as Russia at the request of the Austrian government helped it to crush the Hungarian insurgents in 1849. Some publicists deny the legality of intervention at the request of

[1] For a valuable discussion of the whole question, see Dupuis, *Le Principe d'Equilibre*, part I, ch. VI.

rebels, but are disposed to look more favorably on intervention at the request of established governments.[1] Others hold that foreign powers may assist the party that appears to them to have justice on its side.[2] Neither view can be regarded as sound. Any intervention in an internal struggle is an attempt to prevent the people of a state from settling their own affairs in their own way. It might conceivably be justified on grounds of humanity or by some of the other considerations that we have already examined; but if all that can be said in its favor is that it was entered upon by request, the case for it breaks down completely. It is an attack on independence without adequate cause, and consequently a gross violation of International Law. In no case can an incitement to do wrong render the act done in consequence of it lawful and right. The same reasoning applies to interventions for the purpose of putting down revolution. When in 1820–1823 the Holy Alliance was crushing by means of Austrian troops movements in favor of political liberty in Naples, Piedmont, and other states, and inciting France to invade Spain in order to restore Ferdinand VII to the plentitude of his absolute power, Great Britain, by the pen of Canning "disclaimed any general right of interference in the internal concerns of independent nations." [3] Undoubtedly the brilliant minister enunciated a true doctrine. No such right exists. The assumption of it by the monarchs of the Holy Alliance was an offence against that principle of international solidarity which they professed to hold so dear. A successful revolution in favor of a republic is doubtless unwelcome to monarchical states, and a successful revolution in favor of a monarchy is equally unwelcome to republican states. But all alike must allow their neighbors to make such changes in their governments and institutions as seem best to them, and to make them by force as well as by constitutional means.

[1] *E.g.* Woolsey, *International Law*, § 41.

[2] *E.g.* Vattel, *Droit des Gens*, bk. II, § 56.

[3] Hertslet, *Map of Europe by Treaty*, vol. I, p. 318; Wheaton, *History of the Law of Nations*, part IV, §§ 22, 23; Canning, *Despatch to the French Chargé d'Affaires of Jan. 10, 1823. British and Foreign State Papers* (1822–1823), p. 21.

Any real dangers to other states which may arise in the process can be dealt with under one or more of the recognized grounds of intervention.

§ 69

Various conclusions concerning intervention.

Hitherto, for the sake of clearness, we have treated each separate case as if it came entirely and exclusively under one of the various heads into which we have divided interventions. But in actual life matters are not so simple. The same intervention often possesses a variety of aspects, and attempts are made to justify it on several grounds. The formation of a judgment upon it is difficult in proportion to its complication. Few international proceedings of recent years have been more bitterly attacked and more strongly defended than the British intervention in Egypt, which began in 1882. It involved for Great Britain questions of safeguarding vital interests in connection with the Suez Canal and the route to India, questions of national honor with regard to the promises made to Tewfik Pasha in 1879, questions of good government with regard to the suppression of the Arabist movement and the reform of the administration, questions of finance with regard to the Egyptian debt, and questions of the rights of other states in connection with the dual control which was shared with France, and the suspension of the Law of Liquidation which was signed by no less than fourteen powers.[1] It will not be necessary to enter into the controversies which this intervention aroused. We have referred to it in order to show how complicated such a proceeding can be, and how at every turn it involves disputes on matters of fact as well as legal principles. We may add to them a few others, which will be found useful guides to correct conclusions. From what has been already said it follows, as a corollary, that interventions in the internal affairs of states are greater infringements of their independence than interferences with their external action, which must, from the nature of the case, be concerned with other powers. Such interventions, therefore, should be watched with the utmost jealousy, and require

[1] Holland, *European Concert in the Eastern Question*, pp. 98–205.

the strongest reasons in order to justify them. Further, interventions carried on by the Great Powers as the representatives of civilization, or by the Great Powers of Europe as the accepted leaders of the states of Europe, are more likely to be just and beneficial than interventions carried on by one power only. But history seems to show that when two or three states combine in a temporary alliance for the purpose of regulating the affairs of some neighbor, they not only possess none of the moral authority attaching to the proceedings of the Great Powers, but are exceedingly likely to quarrel among themselves. The joint intervention of France and England in Egypt is a case in point. It may be held to have begun in 1878, and it ceased in 1882 by the withdrawal of France when it was deemed necessary to put down the Arabist rebellion by armed force. It is not too much to say that from that date till 1904, when the Declaration concerning Egypt and Morocco put an end to the friction between the two powers, the policy of France was directed towards making the British position in Egypt as uncomfortable as possible. The intervention of the German Confederation in the Schleswig-Holstein question in 1864 is a more conspicuous warning still; for it ended in the war of 1866 between Austria and Prussia, the two chief intervening powers.

## § 70

The doctrine of non-intervention.

So prone are powerful states to interfere in the affairs of others, and so great are the evils of interference, that a doctrine of absolute non-intervention has been put forth as a protest against incessant meddling. If this doctrine means that a state should do nothing but mind its own concerns and never take an interest in the affairs of other states, it is fatal to the idea of a family of nations. If, on the other hand, it means that a state should take an interest in international affairs, and express approval or disapproval of the conduct of its neighbors, but never go beyond moral suasion in its interference, it is foolish. To scatter abroad protests and reproaches, and yet to let it be understood that they will never be backed by force of arms, is the surest

way to get them treated with angry contempt. Neither selfish isolation nor undignified remonstrance is the proper attitude for honorable and self-respecting states. They should intervene very sparingly, and only on the clearest grounds of justice and necessity; but when they do intervene, they should make it clear to all concerned that their voice must be attended to and their wishes carried out.[1]

[1] [Two recent monographs on intervention are those of Henry G. Hodges (1915), and Ellery C. Stowell (1921).]

# CHAPTER II

## RIGHTS AND OBLIGATIONS CONNECTED WITH PROPERTY

### § 71

States are political units capable of holding both territorial and non-territorial possessions.

INTERNATIONAL LAW regards states as political units possessed of proprietary rights over definite portions of the earth's surface.[1] So entirely is its conception of a state bound up with the notion of territorial possession that it would be impossible for a nomadic tribe, even if highly organized and civilized, to come under its provisions. The whole law of jurisdiction, much of the law of diplomacy, and many of the rules that govern war and neutrality, imply that the communities subject to them have sovereign rights over territory. These rights are quite compatible with the private ownership of land and indeed secure for it the protection without which it could not exist. But a state may hold non-territorial as well as territorial possessions; and it will be well to deal with them at once, in order that we may dismiss them from further consideration, and go on to consider the important questions connected with national ownership of land and water. The non-territorial possessions of a state are its buildings and chattels. Every civilized and independent political community possesses in greater or less abundance such things as palaces, museums, ships, forts, arsenals, arms, ammunition, pictures, and jewels. They belong to it in its corporate capacity; and most questions which arise with regard to the right of ownership over them, or the right to use and enjoy them, are settled by municipal law. We refer, for instance, to the law of the land, and not to International Law, when we want to know when we may visit a national art gallery, or what compulsory powers the government has, to take the land of private owners

[1] An able statement of the contrary view, that sovereignty is distinct from property, will be found in Westlake's *Collected Papers*, chapter IX.

for the erection of forts and magazines on it. It is only when war breaks out between two states, and such possessions as we are considering become subject to belligerent capture, that International Law steps in to settle the nature and limits of proprietary rights over them. The laws of war decide the extent of their liability to hostile seizure, and the kind and degree of control that can be exercised over them when seized. We shall examine these questions when we come to deal with belligerent rights. Meanwhile we may mention here that vessels belonging to the state — public vessels as they are called to distinguish them from ships that are the property of private individuals — need not necessarily be adapted for warlike purposes. If they are owned by the state, manned by individuals in its service, and navigated under the command of its officers, they are state property. Even if hired by the state, they are public ships while the hiring lasts, provided that they are entirely given up for the time being to the service of the government and are under the control of its officers. Sometimes the word of the commander has been held to be sufficient evidence of state ownership.

## § 72

Extent of a state's territorial possessions.

We will now proceed to a consideration of the rules of International Law with respect to the important group of subjects connected with a state's territorial possessions. We will begin by endeavoring to answer the question, Of what does a state's territory consist? It consists, first, of the land and water within that portion of the earth's surface over which the state exercises rights of sovereignty. All rivers and lakes that are entirely within its land boundaries are as much its territory as the soil they water. And if a river flows through several states, each possesses in full ownership that portion of the course which passes through its territory. But if one state holds the land on one bank of a river and another state possesses the opposite bank, the boundary line between them is drawn down the middle of the navigable channel, and includes the islands on either side, except when established

custom or a treaty still in force gives to one of them the whole stream. The same rule holds good of frontier lakes, such as Lake Ontario, the northern shore of which is Canadian territory while its southern coast belongs to the United States. In all these cases it will be noticed that water is held to be appurtenant to land, not land to water. The rules concerning them are taken with scarcely any alteration from the *jus gentium*, and are part of that heritage of Roman Law with which Grotius and his fellow-workers endowed the international code.[1]

Secondly, a state's territory includes the sea within a three-mile limit of its shores. Along a stretch of open coast line the dominion of the territorial power extends seaward to a distance of three miles, measured from low-water mark. The rule of the marine league was introduced at the beginning of the last century as a practical application of the principle laid down by Bynkershoek[2] and others, that a state's dominion over the sea should be limited to that portion of it which she can control from the land by means of her artillery, this being obviously all that can be needed to provide for her own safety. Her sovereign rights were to extend *quousque tormenta exploduntur*. And as at that time the furthest range of cannon was about three miles, the accepted maxim, *Terrae dominium finitur ubi finitur armorum vis*, seemed to dictate the marine league as the appropriate distance. Opposing views gradually died out, though remnants of them survived into the recent past, as was shown by the claim of Spain to two marine leagues round the coast of Cuba, which was stoutly opposed by Great Britain and the United States,[3] and came to an end when the latter power deprived Spain of the island in 1898. There can be no doubt now that, whatever difficulties may still linger as to bays and indentations, the rule we have laid down rests upon the solid basis of general consent. It gives to a maritime state reasonable security from attack, the needful control over shipping, and protection for the population of its coast line in

[1] Justinian, *Institutes*, bk. II, tit. i, 22, and *Digest*, 41. 1. 29, and 43. 12. 1. 7. Moore, *International Law Digest*, vol. I, pp. 616–621.

[2] *De Dominio Maris*, ch. II.

[3] Wharton, *International Law of the United States*, §§ 32, 327.

the enjoyment of the means of subsistence that they derive from their proximity to the sea.[1] It has been adopted not only in the domestic legislation of maritime states, but also in great international documents, such as the North Sea Fisheries Convention of 1882, which defined territorial waters as those which came within three miles, measured from low-water mark along the coast of each of the signatory powers.[2] A few attempts have been made in recent times to extend the limit in order to keep pace with the increased range of modern artillery. For instance, in 1863 Mr. Graham, the United States consul at Cape Town, demanded the release of the Federal merchant vessel, the *Sea Bride*, which had been captured by the Confederate cruiser *Alabama* within four miles of the shore, but outside the three-mile limit. He based his demand upon the doctrine that since the invention of rifled cannon territorial waters extended to at least six miles. The British Governor of Cape Colony declined to interfere, on the ground that the rule of the marine league held good.[3] Mr. Graham's action was not seriously backed by his Government; and it may be taken for granted that, in spite of tentative efforts at alteration,[4] the rule of the three-mile limit is a valid part of modern International Law. But a tendency to reopen the question is showing itself, and is amply justified by the increase of the range of cannon from three to fifteen miles. The Institute of International Law discussed the matter at Paris in 1894. It drew a sharp distinction between territorial waters and waters over which a neutral state should be allowed to exercise the authority necessary to enforce its neutrality. On the ground that the marine league is insufficient to protect coast fisheries, it suggested the extension of the territorial zone to six miles; and it gave each neutral state power to declare to belligerents the number of marine miles it deemed needful for the guaran-

[1] Perels, *Seerecht*, § 24. [2] Hertslet, *Treaties*, vol. xv, p. 795.

[3] British Parliamentary Papers, *North America, United States* (1864), vol. LXII, pp. 19–29. [See also Walker, *Manual of Public International Law*, pp. 172–174 for a case directly raising this point.]

[4] Bluntschli, *Droit International Codifié*, § 302; Phillimore, *Commentaries upon International Law*, part III, ch. VIII.

tee of its neutrality, provided they did not exceed the range of cannon mounted on the shore. The maritime powers were recommended to meet in congress to adopt these and other rules.[1] States are, however, hard to move. The suggested congress has never been held. As late as 1904 the British Government declared in the House of Commons that it was not prepared to recognize any extension of the three-mile limit, and early in 1911 it protested against a Russian attempt to extend the limit to twelve miles in order to protect the Archangel fisheries,[2] [and during the great war denied a similar claim on the part of the Argentine and Uruguay].[3]

In the third place, a state is held to possess, in addition to the marine league, narrow bays and estuaries that indent its coast, and narrow straits both of whose shores are in its territory. The case of such straits is ruled by a simple deduction from the principles already laid down. If the passage is less than six miles across, it is wholly territorial water, because a marine league measured from either shore covers the whole expanse. If it is more than six miles across, a league on either side belongs to the territorial power and the mid-channel is part of the open sea, which belongs to no state but is common to all for use and passage. Usage, however, sometimes modifies this rule. For instance, the Straits of Fuca, between Vancouver Island and the territory of the United States, are divided throughout into British and American waters, though they vary in width from ten to twenty miles. With regard to bays and estuaries there is more doubt. The principle that such of them as are narrow should belong to the state that possesses the adjacent land, is universally admitted. For its own protection against possible enemies it is entitled to exercise the powers of ownership over what are really gates leading into its dominions. But when we come to define the exact extent of the waters that may properly be appropriated in pursuance of this principle, we find no general agreement. If the distance from point to point across the mouth of a bay is not more than six

[1] *Annuaire de l'Institut de Droit International*, 1894–1895, pp. 281–331.

[2] London *Times* of June 3, 1904, and February 25, 1911.

[3] [Oppenheim, *International Law*, vol. I, p. 335*n*.]

miles, that bay becomes territorial water under the accepted rule of the marine league. There is, however, a disposition to hold that the distance should be extended; but at present the common consent of nations has not fixed upon a generally accepted limit, though there is a considerable amount of authority in favor of ten miles. This was the rule adopted in the Fishery Convention of 1839 between Great Britain and France;[1] but the Institute of International Law at the Paris meeting to which we have already referred voted by a large majority in favor of raising the limit to twelve miles. The mixed commission appointed under the provisions of the Convention of 1853 between the United States and Great Britain for the purpose of settling claims made by the citizens of each nation upon the government of the other, dealt with fishery disputes, and decided against the claim of Great Britain that the Bay of Fundy was British territorial water, on the ground, among others, that the distance from headland to headland across its opening was greater than ten miles.[2] In 1888 a Fishery Treaty was negotiated at Washington between the two powers, but failed to come into operation on account of the refusal of the Senate of the United States to ratify it. It is, however, important for our present purpose, because it adopted the ten-mile line in the case of bays, creeks and harbors not otherwise specially provided for by its articles.[3] But it cannot be said that there is a definite rule of International Law on this matter, as there is in the case of the marine league. The claims of states to large tracts of marginal waters—claims which are themselves relics of yet wider claims to dominion over oceans and seas—increase the difficulty of the question. Some of them are dead or dormant; but when a valuable fishery is retained for native fishermen by the assertion of sovereignty over a bay of considerable size, or when considerations of self-protection or political advantage are prominent, we find that states insist upon and often obtain recognition of their demands,

[1] Hertslet, *Treaties*, vol. v, p. 89.

[2] Wheaton, *International Law* (Dana's ed.), note 142; Moore, *International Law Digest*, vol. I, pp. 785–787.

[3] British Parliamentary Papers, *United States*, No. 1 (1888).

some of which are based upon very ancient precedent. Thus the Dutch claim to regard the Zuyder Zee as territorial water is generally recognized, and some writers hold that the United States possesses in full ownership Chesapeake and Delaware bays.[1] Great Britain has almost forgotten her pretensions to sovereignty over what she called the King's Chambers, that is to say, portions of open sea, cut off by drawing imaginary lines from headland to headland along her coast; but they have never been formally withdrawn.[2] And by the Fishery Convention of 1839 already alluded to, exceptions were allowed to the ten-mile rule laid down in it. The utmost we can venture to say is that there is a tendency among maritime states to adopt this rule, and probably it will in time become the law of the civilized world. [In the North Atlantic Coast Fisheries Arbitration, 1910, the Hague tribunal rejected the contention of the United States of America that a bay ceases to be territorial if its width exceed three miles, and decided that "in case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay." On the face of it, this goes considerably further than the ten-mile rule, and the tribunal certainly gave an intelligible basis for this extension in stating that a bay, by its very nature, concerns the interests of the territorial sovereign to a more important extent than the open coast, e.g., in matters of defence and commerce. But the tribunal also recognized that Great Britain had adopted the ten-mile rule in a number of treaties, and recommended the parties to accept it as applying to all the bays in dispute, for which no specific provision was made in the award. It therefore admitted that circumstances may vary the application of the wider rule which it laid down.][3] It is, however, universally conceded

[1] Ortolan, *Diplomatie de la Mer*, liv. II, p. 152; C. F. de Martens, *Précis*, § 42; Kent, *Commentary on International Law* (Abdy's ed.), pp. 113, 114.

[2] Walker, *Science of International Law*, p. 170, notes 3 and 4.

[3] [*American Journal of International Law*, vol. IV, pp. 948–1000. Pitt Cobbett's *Leading cases on International Law*, vol. I, pp. 158–167. Sir Cecil J. B. Hurst in *British Year Book of International Law* (1922–1923), pp. 42–54.]

that when a bay or estuary is territorial water, the marine league is to be measured from the imaginary line across its entrance.

In the fourth place, a state possesses the islets fringing its coast. A hold on them is essential to its peace and safety. The question was raised in 1805 in the case of the *Anna*,[1] which was a ship of somewhat doubtful character captured when flying the American flag by a British privateer near the mouth of the Mississippi. The seizure was made more than three miles from firm ground, but within a league of a chain of mud islets which fringed the coast and formed a "sort of portico to the mainland." The United States was neutral in the war between Great Britain and Spain, and its minister in London claimed the ship in the British prize court, on the ground that the capture was made within American territorial waters. The judgment of Lord Stowell sustained this contention and ordered the release of the ship. He held that the islands, though not firm enough to be habitable, must be regarded as part of the territory, since they were formed by alluvium[2] from the mainland, and their possession was necessary for the command of the river. "If they do not belong to the United States of America, any other power may occupy them, they might be embanked and fortified. What a thorn would this be in the side of America." There can be no doubt of the justice of Lord Stowell's decision, and the rule that resulted from it has received general recognition.

## § 73

We have seen that states may possess both land and water. Can they possess air also? [The topic has evoked a considerable mass of juristic literature in which three distinct lines of argument are traceable. According to the first, the air space above state territory is as completely subject to state sovereignty as is the territory itself. According to the second, the air,

Is the air above a state a part of its territory?

[1] C. Robinson, *Admiralty Reports*, vol. v, pp. 373, 385*c*–385*d*. [Adopted in *Secretary of State for India* v. *Chelikani Rama Rao* (1916) L. R. 43 Indian Appeals, 192.]

[2] Justinian, *Institutes*, bk. II, tit. i, 20.

like the high seas, is open to free navigation by all aircraft, subject to the right of states to provide for the security of their territory.[1] The third view is that, while the sovereignty over the air space remains with the subjacent state, yet it is subject to a servitude in favour of foreign aircraft. This view appears to hit a workable mean between the theory of undiluted state sovereignty over the air (which ignores the fact that aviation is never likely to be a purely national affair) and the theory of complete freedom of aerial navigation (which takes no account of the fact that air is not water, and that while ships do not usually end their voyages on land, most air vessels must). Turning to international practice, an international conference on rules for aerial navigation, held at Paris in 1910, proved to be abortive. The four years of the great war were barren of any legal results, but fertile in incidents that might, and did, lead to them after peace in the shape of the Convention for the Regulation of Aerial Navigation, 1919,[2] which was signed by the British Empire, France, Italy, and twelve minor powers. It is important to note that the Convention is, in effect, limited to time of peace. It recognizes that every state has complete and exclusive sovereignty in the air space above its territory and territorial waters; but it nevertheless allows in time of peace freedom of innocent passage to aircraft, and thus adopts the principle of the third view stated above. Each state may, for military reasons or in the interest of public safety, prohibit aircraft from flying over certain areas of its territory, provided no distinction is made between its own private aircraft and foreign aircraft. All aircraft have the right to cross another state without landing, but they must follow the route fixed by the territorial state; and, if the latter's regulations require it, they shall land in one of the aerodromes fixed for that purpose. Every state may reserve to its national aircraft the carriage of persons and goods for hire between two points on its own territory. All aircraft engaged in international navigation must have (*inter alia*) certificates of registration of nationality and of airworthiness, and upon landing

[1] [Cf. *Institut de Droit International. Annuaire* (1911). Vol. XXIV, p. 346.]

[2] [*State Papers. Treaty Series* (1919). Cmd. 670.]

the authorities of the country have the right to visit aircraft in order to verify all such documents. Carriage of explosives and arms is forbidden. Such are some of the leading provisions with respect to private aircraft. There are separate regulations for state aircraft, which are defined as (a) military aircraft; (b) aircraft exclusively employed in state service, such as posts, customs, police. Flight over, and landing upon, state territory is not allowed to foreign military aircraft without special authorization. If this be granted, they have the privileges of exterritoriality accorded to foreign ships of war. States must arrange among themselves the conditions on which police and customs aircraft may cross state frontiers. Postal aircraft is apparently to be treated like private aircraft. The Convention provides for the creation of an International Commission for air navigation, which is practically a bureau for information and for proposals to amend the Convention.] [1]

## § 74

Having seen of what a state's territory consists, we have now to discuss how it may be acquired. Various titles are recognized as valid. They may be divided into those that spring from original modes of acquisition and those that spring from derivative modes of acquisition. The original modes are those by which states acquire territory that is in technical phraseology *res nullius*, that is to say, has not previously been regarded as part of the dominions of any civilized power. The derivative modes are those by which a state acquires territory that previously belonged to a civilized power. They therefore involve a transfer from one acknowledged international person to another. Occupation and accretion are the two modes of original acquisition. Cession, conquest, and prescription are the three modes of derivative acquisition. We will describe these five one by one, and set forth in order the rules applicable to each. The first, and one of the most important, is:

Modes whereby states can acquire territory: (1) Occupation.

[1] [See Spaight, *Aircraft in Peace* (1919). Kuhn in *American Journal of International Law* (1920), vol. XIV, pp. 369–381. De Montmorency in *British Year Book of International Law* (1921–1922), pp. 166–173.]

*Occupation.*

Title by occupation applies only to territory not previously held by a civilized state. It was introduced into International Law during the sixteenth and seventeenth centuries, when the discovery of America had provided new problems to tax the ingenuity of jurists. Hitherto they had dealt with countries where sovereign rights had been exercised from time immemorial. The transfer of these countries, or parts of them, from one state to another was all they had to provide for, and they experienced little difficulty in performing the task. Now they were suddenly confronted with the question how sovereignty could be acquired over vast tracts inhabited only by tribes of wandering savages, or at best under governments that were non-Christian and uncivilized as Europe understood civilization. At first they seemed disposed to hold that mere discovery was sufficient to create a good and complete title. Thus Spain claimed the whole coast of America northward from the Gulf of Mexico on the ground of a possible discovery of Florida in 1498 by Amerigo Vespucci[1] and a certain landing on its shore by Ponce de Leon in 1513. But the English claimed the greater part of the same coast on account of the discovery of Cape Breton or Newfoundland by John Cabot in 1497, and the exploration of the shore, from Nova Scotia to Cape Hatteras, by his son Sebastian in 1498, while a few years afterwards France put in a similar claim based on the discovery of what is now North Carolina in 1524 by Verrazano, a Florentine in the service of the French king. It is hardly necessary to dwell on the famous Bulls of 1493 and 1494, by which Pope Alexander VI attempted to divide the lands of the New World between Spain and Portugal.[2] For one at least of the grantees laid little stress on the title thus obtained, and Protestant powers ignored it as a matter of course.[3] Nor did they stand alone. The oft-quoted reply of Queen Elizabeth of England to Mendoza, the ambassador of Philip II, that she did not "acknowledge the Spaniards to have any title by donation of the Bishop of Rome,"

[1] Fiske, *Discovery of America*, vol. II, pp. 24–93.
[2] *Cambridge Modern History*, vol. I, p. 23.
[3] Westlake, *International Law*, part I, pp. 94–96.

may be capped by the mocking questions of Francis I of France to Charles V of Spain. "By what right do you and the King of Portugal undertake to monopolize the earth? Has Father Adam made you his sole heirs; and if so, where is a copy of the will?"

The exaggerated importance attached to first discovery did not long continue. The doctrine that it must be followed by some formal act of taking possession, some expression of the will of the state, as Vattel put it,[1] soon arose. This amounted to something very much like occupation, by which, as understood in Roman Law, a valid title was obtained to any *res nullius* by taking physical possession of it with the intention of holding it as one's own.[2] In the minds of the classical jurists occupation applied chiefly, if not entirely, to movables. It was what they called a natural mode of acquisition, whereby proprietary rights were obtained by individuals over things that had no owner.[3] The founders of modern International Law applied those old Roman rules of the *jus naturale* to the acquisition of sovereign rights by states over newly discovered continents.[4] Thus discovery was gradually deposed from the all-important position it once occupied; and in modern times few, if any, authorities would be prepared to say that a good title to territory could be based by a state upon the bare fact that its navigators were the first to find the lands in question. But though statesmen and publicists endeavored to find legal ground for national claims, the controversies of the seventeenth and eighteenth centuries between the colonizing nations of Europe as to the extent of their possessions on the American continent, were largely settled by the sword; and where its aid was not invoked boundaries were determined rather by compromise, or the political exigencies of the moment, than by International Law. The process of portioning out the American continent among the civilized states was consummated in the middle of the nineteenth century, when the Treaty of 1846 divided the great Northwest between the United States and

[1] *Droit des Gens*, bk. I, § 207.
[2] *Digest*, 41. 1. 3.
[3] *Digest*, 41. 1. 1; 41. 2. 1.
[4] *E.g.* Grotius, *De Jure Belli ac Pacis*, bk. II, ch. III, 1–4.

the British Empire.[1] From that time onwards every foot of ground in the New World was part of the territory of some civilized country, and no power was free to obtain fresh possessions therein by occupation.[2] It seemed, therefore, as if the legal questions connected with that method of gaining an international title to territory had no more than an historic interest. But the last fifty years have seen a great revival of interest in them, owing to that modern "scramble for Africa" which has taken the place of the old "scramble for America." The principles of occupation have been restudied and applied anew. We will endeavor to state as clearly as possible what may be deemed the modern doctrine, warning our readers, however, that in some of its parts it must be taken to represent tendencies towards law rather than rules of universal acceptance.

Occupation as a means of acquiring sovereignty and dominion applies only to such territories as are no part of the possessions of any civilized state. It is not necessary that they should be uninhabited. Tracts roamed over by savage tribes have been again and again appropriated, and even the attainment by the original inhabitants of some slight degree of civilization and political coherence has not sufficed to bar the acquisition of their territory by occupancy. All territory not in the possession of states who are members of the family of nations and subjects of International Law must be considered as technically *res nullius* and therefore open to occupation. The rights of the natives are moral, not legal. International morality, not International Law, demands that they be treated with consideration.

Occupation is not effected by discovery. The world has become so well known that very little land remains to be discovered in modern times, and there is often great doubt and dispute with regard to the exploits of earlier navigators. The utmost that can be said for discovery to-day is that, if a navigator of one state came home with the news that he had found an island or district hitherto unknown, other states would be bound by the comity of nations to wait a reasonable

[1] *Treaties of the United States*, p. 438.

[2] The islands of the extreme north may perhaps be an exception.

time before sending out expeditions in order to annex it. We may add that though discovery alone does not give a title, it strengthens a title based on occupancy.[1] The best modern practice, and the views of the most acute and thoughtful publicists, support the doctrine that effective international occupation is made up of two inseparable elements—*annexation* and *settlement*. By the formal act of annexation the annexing state notifies its intention of henceforth regarding the annexed territory as a part of its dominions; and by the patent fact of settlement it takes actual physical possession of the territory and retains a hold upon it. The formalities accompanying annexation are not prescribed by International Law. In modern times it is usual to hoist the national flag and read a proclamation setting forth the intention of the government to take the territory in question as its own;[2] but any ceremony of clear import done on the spot in a public manner is sufficient. It must, however, be an undoubted act of the central government speaking on behalf of the state. If the proper authorities have sent out an official specially charged with the duty of making a particular acquisition, the act of annexation performed by him is in the highest degree a state act, and therefore valid. But subordinate authorities have no such power, and their proceedings would be null and void unless they were ratified by the supreme government.[3] Thus when in 1883 the ministry of the British Colony of Queensland endeavored to annex on their own authority the greater part of the island of New Guinea, together with New Britain, New Ireland, and a large number of other islands off the north coast of Australia from longitude 141° to longitude 155°, the Home Government refused ratification of so sweeping an act. All it would consent to do was to add to the Empire a large portion of the south-east of New Guinea, with which were subsequently joined some groups of adjacent islands. The original annexation took place in 1884,[4] and at

[1] Maine, *International Law*, p. 67.
[2] *E.g.* Hertslet, *Treaties*, vol. xvii, pp. 670, 671.
[3] Maine, *International Law*, pp. 66–68.
[4] Hertslet, *Treaties*, vol. xvii, pp. 678, 679.

the end of that year Germany annexed another portion, and established a protectorate over the islands of New Britain and New Ireland, which had been discovered in 1699 by Dampier, a great British navigator, and nominally taken possession of for Great Britain in 1767 by Captain Carteret of the Royal Navy. His act was, however, never ratified, and consequently it had no validity, though he bore the commission of King George III.[1] A private person cannot perform even an inchoate annexation. Any ceremony he may go through is invalid from the beginning, and incapable of ratification. In order to annex, a state act is necessary, which may be direct, as when it is done by an officer commissioned especially for the purpose or armed with a general authority to annex under certain circumstances, or indirect, as when it is performed by subordinate authorities on their own initiative, but afterwards ratified by the central government.

Annexation alone is incapable of giving a good title. It is necessary for effective occupation that some hold on the country be taken and maintained. This is done by settlement; that is to say, the actual establishment of a civilized administration and civilized inhabitants upon the territory in question and their continuous presence therein. They may be established at one spot or many. Their posts may be civil, or military, or a mixture of the two. They may live upon the resources of the country or upon supplies sent from home. But there must be a permanent community. A temporary camp withdrawn after a time to the mother-country will not be sufficient to keep alive rights of sovereignty over the territory purporting to be occupied. There must be a real possession, as Vattel argued more than a century and a half ago.[2] In most cases annexation comes first and settlement follows, but this order is sometimes reversed, as was the case with the British colony of Natal, the principal seaport of which, Port Natal or Durban, was founded by a little band of British settlers in 1824, nineteen years before the district was annexed by Great

[1] London *Times* of Dec. 23, 1884; *Annual Register, 1884*, pp. 432–434.

[2] *Droit des Gens*, I, § 207.

Britain.[1] The mere fact of settlement, like the mere fact of annexation, will not give sovereign rights while it stands alone. It does not matter which of the two comes first, but they must coexist in order to make a valid occupation. This consideration alone is sufficient to dispose of all claims to sovereignty over the newly discovered Poles. At the North Pole there is ocean, and at the South Pole there is land; but at neither can man make for himself a home and keep a grip on the frozen wastes around. Moreover, it is necessary that the hold upon the territory should be maintained continuously, or at the least that any cessation of control should be temporary and intermittent. A territory once occupied can be abandoned, as the British abandoned the island of Santa Lucia in 1640, after their settlers had been massacred by the Caribs. And when such an abandonment has been shown by lapse of time, or in any other way, to be definite, another state is at liberty to treat the territory as again in the condition of a *res nullius* and occupy it, as the French occupied Santa Lucia in 1650. But the case of Delagoa Bay seems to prove that a temporary lapse of control over territory will not be sufficient to invalidate a claim based upon the exercise for centuries of more or less continuous authority. The territory in question was claimed by England and Portugal, and the dispute between them was referred to the arbitration of Marshal MacMahon, then President of the French Republic. His decision in 1875 in favor of Portugal was based upon the ground we have indicated.[2]

It is admitted on all hands that the rights of sovereignty gained by occupation extend beyond the territory inhabited and used by the original settlers or commanded by the guns of their forts. All sorts of principles have been laid down according to the exigencies of the moment as to the extent of territory acquired by an act or series of acts of annexation and settlement; and the Roman Law from which the rules of occupancy were originally derived gives little help toward the solution of these difficulties. But a few principles and pre-

[1] Bryce, *Impressions of South Africa*, pp. 119–122.

[2] Hall, *International Law*, 7th ed., § 34.

cepts, some positive and some negative, may be evolved from their history.

The whole of an island, unless it be very large, and even a group of very small islands, may be acquired by one act of annexation and one settlement. Thus, in 1885, Great Britain and Germany took possession of the Louisiade Archipelago and the Marshall Islands respectively. Both groups are situated off the eastern end of New Guinea, and were taken in consequence of the acquisitions made on that island. In each case one formal act of annexation was held to be sufficient for the entire group.[1] The rules that apply to continents will apply to islands of vast extent like Australia, which is often called a continent. It belongs to the empire of Great Britain, because a large number of British settlements fringe its coasts and run far up into the interior, and over the whole of it Great Britain exercises actual or potential authority. But there can be no doubt that if other powers had colonized there at the end of the eighteenth century, when England's sole settlement was at Botany Bay, they would have been entitled to divide with her the vast territories that are now hers exclusively by a perfectly valid title.

A state cannot acquire a whole continent by establishing a few settlements upon one of its coasts and going through the formal ceremony of annexation, nor can the colonization of one shore or a part of one shore of a continent give a title right across it to the opposite coast. These statements are mere negations; but, nevertheless, they enunciate a very important principle, and one which was not at first recognized by the colonizing nations of Europe. Spain and France vied with each other in the magnitude of the pretensions they based upon isolated acts of discovery, annexation, and settlement, and some of the charters given by the kings of England to the early British colonists in America expressly granted territorial rights across the continent to the Pacific Ocean. But when these documents were referred to by the American commissioners at the conference held in London in 1826–1827 on the Oregon boundary question, the British negotiators declared that they

[1] *Annual Register, 1884*, pp. 433, 434.

had no international validity and could give to the grantees no more than an exclusive title against their fellow-subjects.[1] This was undoubtedly a correct statement. Modern International Law lends no sanction to such preposterous claims.

Occupation of a considerable extent of coast gives a title up to the watershed of the rivers that enter the sea along the occupied line; but settlement at the mouth of a river does not give a title to all the territory drained by that river. Water is appurtenant to land, not land to water. If a coastline is effectively occupied, the rivers that fall into the sea throughout its extent, and the country drained by them, are held to belong in full sovereignty to the power whose settlements are dotted along the shore. This rule provides room for reasonable extension inland, but gives no countenance to the limitless pretensions of which we have just spoken. It is nowhere better set forth than in the words of Messrs. Monroe and Pinckney, the American negotiators at Madrid in the controversy of 1803–1805 about the boundaries of Louisiana. They declared: "When any European nation takes possession of any extent of sea-coast, that possession is understood as extending into the interior country to the sources of the rivers emptying within that coast, to all their branches and the country they cover." This doctrine they described as "dictated by reason" and "adopted in practice by European nations." It is generally accepted as good in law, but with the proviso that the extent of coast which is effectively occupied must bear some reasonable proportion to the extent of inland country claimed as appurtenant to it. Further, as Sir Travers Twiss points out,[2] it is inconsistent with the claim to the whole territory drained by the Columbia River, put forth by Mr. Gallatin on behalf of the United States in 1827, on the ground of first discovery of the mouth of the river, and the subsequent erection of a trading-post close to it. This claim was never conceded; and when the Treaty of 1846 closed the controversy, it gave to Great Britain the upper waters of the Columbia River and the country through which they flow.[3]

[1] Twiss, *Law of Nations*, vol. I, § 126.

[2] *Ibid.*, vol. I, §§ 125, 126.

[3] *Treaties of the United States*, p. 436.

In the absence of natural features the boundary of the contiguous settlements of two states along the same coast should be drawn midway between the last post on either side. The boundary line between the possessions of the United States and Spain on the Gulf of Mexico was finally drawn in accordance with this principle.[1] But there can be no doubt that natural boundaries would be preferred to an imaginary line in cases where they exist. If a navigable river falls into the sea between settlements made by one nation and settlements made by another, each would be deemed to have occupied up to the bank on its side of the river, and the boundary line between them would be drawn down the middle of the channel.

The rules just enunciated close the door to many disputes, but all of them are not so precise in their terms as to be incapable of diverse interpretations when applied to concrete cases. Moreover, it is conceivable that a state might contest the applicability of some of them to Africa, since they are derived chiefly from American experience, and the two continents are not alike either in geographical features or in political circumstances. Considerations such as these have prompted the great European states who have engaged in the recent competition for territory and influence in Africa to enter into agreements among themselves with a view to avoiding future conflicts. These have taken the form of treaties for the delimination of what are called spheres of influence, which will be explained under a separate heading.[2]

But the most important and far-reaching of modern developments is to be found in the tendency to demand that an occupying power shall officially make known the limits of the territory it claims to have added to its dominions by each fresh act of occupation, and shall within those limits exercise authority sufficient to secure the primary conditions of civilized existence. These requirements were embodied by the Institute of International Law in the Declaration it adopted at its meeting at Lausanne in 1888;[3] and they are substantially contained

[1] *Treaties of the United States*, p. 1017; Hall, *International Law*, 7th ed., § 33.

[2] See § 81.

[3] *Tableau Général de l'Institut de Droit-International* (1873–1892), p. 145.

in the Final Act of the West African Conference of 1885, which was signed by all the powers of Europe and also by the United States. Each of the signatory powers bound itself to send a formal notification to the others whenever for the future it acquired by occupation a tract of land on the coast of Africa or assumed a protectorate there; and it was understood that the notifications would state the limits of the newly claimed territory. These rules have been already acted on in several instances, and it may be hoped that all states will adopt them, and extend them to any future acquisitions of unoccupied lands, wherever they may be situated. The powers represented at the West African Conference agreed, further, that the appropriating state must keep reasonable order throughout the territory occupied by it on the coasts of the African continent, so as to ensure freedom of trade and transit, and protect existing rights.[1] This provision, too, could with great advantage be turned into a general rule of International Law. [The requirement of notification is, however, omitted from the Convention of 1919, which revised the Final Act of 1885.[2] But the obligation to keep order is not only recognized but made more definite, as it is extended to the maintenance of an authority and police forces sufficient to ensure protection of persons and property. Moreover, we have it on high authority that there exists, quite apart from any treaty stipulation, an obligation on the part of the occupying state at least to restrain the natives from acts of violence against neighboring territories.][3]

It is impossible to study the history of recent territorial acquisitions in Africa and elsewhere without being struck by the simultaneous presence of two things which at first sight appear incompatible. We find, on the one hand, in treaties and diplomatic documents little or no reference to the existence of native inhabitants. The countries they live in are partitioned without the slightest regard to their wishes. They are simply ignored as having no *locus standi* in the matter.

[1] British State Papers, *Africa*, No. 4 (1885), p. 312; *Supplement to the American Journal of International Law*, vol. III, p. 24.

[2] [See § 52.]

[3] [Oppenheim, *International Law*, vol. I, § 228.]

On the other hand, we discover that when the states who, in their mutual agreements, pay no attention to the natives come to deal singly and directly with new territory that they wish to acquire, they are careful to enter into friendly relations with the inhabitants, and as a rule do not take over the country of a tribe without some agreement with it. For instance, between 1884 and 1886 about three hundred treaties were concluded with native states and tribes in respect of the British territories in the basin of the river Niger.[1] This seeming inconsistency is explained when we reflect that International Law, as a technical system of rules for determining the actions of states in their mutual relations, is concerned with civilized communities alone. Occupation gives a valid title under it; but the title can be valid only as between the states who are subjects of the law. When such states come to deal with native tribes, though the technical rules of International Law do not apply, moral considerations do. Justice demands that the inhabitants of occupied districts be treated with fairness. The only moral justification for extending civilized rule over backward tribes is that they may be raised thereby to a higher plane of existence. [Striking proof of the influence of this high ideal has been recently afforded by the tightening of existing restrictions on the liquor traffic in Africa contained in a Convention of 1919;[2] by the Convention of the same date for the control of trade in arms;[3] and by the general duties imposed on mandatory powers under the Covenant of the League of Nations.][4]

§ 75

We now pass on to consider

*Accretion,*

which is the second of the two original modes of acquisition known to International Law. It applies only to water-boundaries; and the rules that define and limit it are taken with little variation from Roman Law.[5] When the action of water adds

[1] *Statesman's Year Book, 1894*, p. 1890.

[2] [*State Papers. Treaty Series* (1919). No. 19. Cmd. 478.]

[3] [See § 52.]

[4] [See § 43.]

[5] Justinian, *Institutes*, bk. II, tit. I, 20–24; *Digest*, 41. 1. 7, 29, 65.

to the land, or when islands are formed off the coast of a state, whether by alluvium or from any other cause, they are regarded as portions of the territory.[1] When a waterway is the boundary between two states, islands formed on either side of the middle of the channel belong to the state that owns that side. If they arise in the central channel itself, they are divided between the two states by a line drawn across or along them in continuation of the line drawn down the middle of the channel. But if a convulsion of nature alters altogether the bed of a boundary river or lake, the line of demarcation does not follow the new bed of the stream, but runs along the bottom of the old deserted channel. There are provisions for exceptions to these rules when, instead of the river itself being the boundary, a fixed line is drawn which happens to touch the river and run along it.

Modes whereby states can acquire territory: (2) Accretion.

§ 76

Among the modes of acquisition which deal with the transfer of dominions already held by civilized states, the most important is

*Cession,*

by which we understand the formal handing over by agreement of territorial possessions from one international person to another. The agreement is embodied in a treaty which usually contains stipulations as to the share, if any, of the public debt to be transferred along with the ceded district, the rights of its inhabitants with regard to citizenship and property, and the obligations to be assumed by the receiving state.[2]

Modes whereby states can acquire territory: (3) Cession.

Since cession is the usual method whereby changes are effected in the distribution of territory among states that are subjects of International Law, it follows that cessions may take place in consequence of transactions of various kinds. Of these we will consider first *sale.* It is not very frequent; but cases of it are to be found even in modern times, as when in 1867 the United States purchased Russian America for $7,200,000.[3]

[1] [*The Anna.* See § 72.]

[2] See § 49.

[3] *Treaties of the United States,* p. 939.

The next ground of cession is *gift*. Free gifts of territory are not altogether unknown, though as a rule the intercourse of states is not conducted on principles of lavish generosity. Yet a government that desired for special purposes to retain another's goodwill has been known to make a gift of territory by treaty of cession. Thus in 1762 France ceded to Spain the colony of Louisiana, in order to indemnify her for the loss of Florida, which had been transferred to England by the Treaty of Paris;[1] and in 1850 Great Britain ceded to the United States a portion of the Horse-shoe Reef in Lake Erie, in order that the government of Washington might erect a lighthouse thereon.[2] But in matters of transfer of territory the gift is far more often forced than free. A state beaten in a war is sometimes obliged to make over a province or a colony to the victor as one of the conditions of peace. Indeed, most cessions are the results of warfare and come under the head of forced gifts. One of the most recent instances is to be found in the cession of Alsace and Lorraine by Germany to France. This was done by the Treaty of Versailles, 1919, and was one of the results of the defeat and downfall of Germany in the great war. Sometimes, but very seldom, sale and forced transfer are combined, as when by the Treaty of Paris of 1898 the United States compelled vanquished Spain to cede the Philippines, but agreed to pay twenty million dollars for the islands.[3] The last ground of cession we will mention is *exchange*. It was common enough in times when territories were cut and carved in order to make provision for the scions of ruling families, but the growth of the principle that populations should have a voice in the settlement of their political destiny has made it comparatively rare. We can, however, find one instance in recent European history. By the Treaty of Berlin of 1878 Roumania ceded to Russia that portion of Bessarabia given to it at Russia's expense in the Treaty of Paris of 1856, and received in exchange the Dobroutcha, which was taken from Turkey.[4]

[1] Wheaton, *History of the Law of Nations*, part II, § 3; C. de Martens, *Recueil*, vol. I, pp. 29–36; Phillimore, *Commentaries*, part III, ch. XIV.

[2] *Treaties of the United States*, p. 444.

[3] Moore, *International Law Digest*, vol. I, p. 531.

[4] Holland, *European Concert in the Eastern Question*, p. 302.

§ 77

The next mode of acquisition involving transfer from one sovereignty to another is

*Conquest.*

We will begin the consideration of it by distinguishing conquest in the legal sense from conquest in the military sense. The latter takes place when the agents of one belligerent state completely subdue the agents of the other in a territory and hold it by military force. The former is brought about when the victorious state exercises continuously all the powers of sovereignty over a territory conquered in a military sense, and signifies by some formal act, such as a diplomatic circular, or a proclamation of annexation, or even by long and uninterrupted performance of the functions of a ruler, its intention of adding that territory to its dominions. The question of what constitutes a valid conquest in the legal sense was fully discussed after the downfall of Napoleon in connection with certain annexations of his in Germany and Italy. The most famous of these cases was that of Hesse Cassel; and it seems to be generally admitted in respect of it that the French Emperor had acquired the Electorate by conquest so as to give international validity to acts done in the capacity of its sovereign. His troops had overrun it in 1806, and he had acted as supreme ruler for some time, and had then added the territory to the Kingdom of Westphalia, which he created for his brother Jerome. This new state was recognized by many powers and remained in existence till 1813. When, therefore, the restored Elector treated Napoleon's confiscation of his private property as null and void, he acted in a violent and illegal manner since completed conquest had put the sovereign power over the Electorate in the hands of the confiscating authority.[1] Title by conquest differs from title by cession in that the transfer of the territory is not effected by treaty, and from title by prescription in that there is a definite act or series of acts other than mere possession, out

Modes whereby states can acquire territory: (4) Conquest.

[1] Phillimore, *Commentaries*, part XII, ch. vi; Hall, *International Law*, 7th ed., § 204.

of which the title arises. These acts are successful military operations; but if a province conquered in a war is afterwards made over to the victorious power by treaty, it is acquired by cession. Title by conquest arises only when no formal international document transfers the territory to its new possessor. When the whole of a conquered state is annexed by the victor there is no international person left with whom he can make a treaty. But when a part only is taken, the vanquished power instead of ceding it in so many words sometimes prefers to omit from the treaty of peace any mention of the transfer, in which case the principle of *uti possidetis* operates, and the territory is made over, but by conquest, not by cession.

§ 78

The last ground of title we have to consider is

*Prescription.*

Modes whereby states can acquire territory: (5) Prescription.

Though its existence in International Law has been denied by some writers,[1] the balance of authority is overwhelmingly in its favor. There can be no doubt that long-continued possession of territory gives a good title to it when no other ground can be clearly shown, and even in cases where possession was originally acquired by illegal and wrongful acts. The same reasons which justify, and even compel, the recognition of prescription as a source of title to private property by the municipal law of all civilized peoples, support its admission into International Law. It is as necessary to put a limit to disputes about national ownership as it is to close legal controversies between individuals. The only distinction between the two cases arises from the absence of a common superior over states. There being no central authority to make and enforce rules, the length of time requisite to give a title by prescription cannot be exactly defined, as it is in municipal law. But nevertheless the principle is undoubted, and a power that should refuse to recognize it would soon be put under ban as a wanton disturber of the general peace. We must, however, remember

[1] *E.g.* G. F. de Martens, *Précis*, §§ 70–71.

that the title arises only when no valid ground of proprietary right can be alleged except long-continued possession.

§ 79

We now pass on to describe the different degrees of power exercised by states over territory that is to a greater or less extent under their authority or subject to their influence. It is necessary to deal with this matter because in quite recent times some of the leading maritime colonizing states have begun to reserve for themselves territories over which they do not for the present exercise full rights of sovereignty; and in consequence, questions have arisen as to the exact nature and limits of the powers possessed by them over such territories. The desire to partition Africa, and the transactions that have taken place in order to secure its peaceful gratification, have forced these questions to the front, if they have not created the problems that are now awaiting solution with regard to them. Modern International Law was familiar with sovereignty, and it knew of suzerainty, though rather as a relation between governments than as a power over territory. The few protectorates of which it was cognizant afforded little scope for the development of international difficulties. Now, however, all is changed. Within the last few years protectorates have sprung up in Africa with the rapidity of tropical vegetation, and questions connected with the responsibilities and mutual duties of the protecting powers have sprung up with them. The creation of spheres of influence has gone on apace; but the name and the thing signified by it are so new, that it is not yet possible to define exactly its legal consequences. In fact, a new chapter is being added to International Law; and in the remarks that follow we can do little more than indicate the direction taken by opinion and practice with regard to the questions comprised in it.

A state may exercise power over territory as (1) A part of its dominions.

There can, however, be no doubt or difficulty in respect of the territory over which a state exercises authority as *a part of its dominions*. Whether such territory has been possessed from time immemorial or acquired but yesterday, whether it is

full of evidences of the most advanced civilization or covered by forest and wilderness, whether most of its people are cultivated and polite or rude and barbarous, the powers exercised over it, and all who dwell upon it, are those of full sovereignty. The state that owns it controls entirely and exclusively both its internal and external affairs, except in those few cases where, as we have stated before,[1] some of the powers of external sovereignty are temporarily or permanently impaired. Its rights and obligations are defined by the common law of nations, and may be known by those who take the trouble to enquire.

§ 80

A state may exercise power over territory as (2) A protectorate.

With regard to *Protectorates* there is more complexity. As we have already seen,[2] the word may describe relations of dependence on the one side and protection on the other between two international persons, or an attitude of expectant ownership and present reservation on the part of a civilized state towards territories inhabited by a population incapable of carrying on anything like state-existence as understood in the society of nations. Protectorates of the former kind are very few in number and too unimportant to require further explanation.[3] Protectorates of the latter kind are numerous. They are simply devices whereby a colonizing state marks off for itself various districts which it does not deem ripe for immediate occupation, but which it wishes to be free to occupy in the future. Meanwhile, by agreement, or otherwise, it exercises a certain amount of authority over the native tribes, and binds them not to enter into political relations with any foreign power, while at the same time it gives such powers to understand that they must refrain from direct dealings with the natives. By a not very happy inspiration the name of *colonial protectorates*[4] has been given both to the districts in respect of which these arrangements hold good, and to the

[1] See §§ 60, 61.

[2] See §§ 39, 43.

[3] Oppenheim, *International Law*, vol. I, § 93.

[4] Nys, *Droit International*, vol. I, p. 365, and vol. II, pp. 80–98; Westlake, *International Law*, part I, pp. 119–127.

arrangements themselves. It does, however, serve for purposes of distinction. In using it we must bear in mind that there is no state to be protected,—only more or less barbarous tribes,—and that the district under the protectorate is not annexed to the protecting state, but reserved for future annexation. In fact, a colonial protectorate bears the same relation to sovereignty that betrothal bears to marriage.

Between the ordinary protectorates which were for a long time the only kind known to International Law and the so-called colonial protectorates, stands a third class, comparatively modern in their origin and somewhat anomalous in their nature. We refer to the cases where a state belonging to the family of nations, and generally an important member thereof, has established what it terms a protectorate over a political community to which it is impossible to deny the name of state, but which is not sufficiently civilized after the European fashion to be regarded as a full member of international society. As examples we may cite the British protectorate over Zanzibar, which was established in 1890, and the French protectorate over Annam, which dates from 1886. In both these countries there is a native ruler—a sultan in Zanzibar and a king in Annam. But the sultan's administration is controlled by a British agent and consul-general, and the king's by a French resident superior. In each case all foreign relations are in the hands of the protecting power.[1] There is, however, a state to be protected, though it is not what has been called a state of International Law. Protectorates of this kind easily shade off into true colonial protectorates; for it is impossible to draw a hard and fast line between communities that are sufficiently civilized to enter into rudimentary political relations with a great state, and communities so barbarous as to have no claim to statehood of any sort. Nevertheless the distinction is a real one. There is an immense difference between states like Zanzibar and Annam, with governments organized on oriental lines, and a tribe of half-naked savages hunting game for subsistence over African plains. Their political destiny is, how-

[1] *Statesman's Year Book, 1909*, pp. 185–187, 783–785; Despagnet, *Droit International Public*, § 133.

ever, usually the same. Protectorates are often instituted over the first, as well as over the second, with a view to eventual annexation. France, for instance, turned Madagascar, which had been a French protectorate since 1885, into a colony in 1896, and thus made it a part of the dominions of the republic. But it sometimes happens that the protected state improves in organization and power, and throws off the unwelcome protection. A case in point occurred in 1896, when Abyssinia, which had been held by Italy to have become a protectorate in 1889, defeated an Italian army, and recovered her full independence by the Treaty of Adis Ababa.[1] [To examples of protectorates of the first kind must be added Egypt, over which Great Britain declared a protectorate in 1914. This was abandoned in 1922, on certain conditions.][2]

Of the three kinds of protectorates we have discussed, colonial protectorates only present problems of marked international importance. The treaties on which each instance of the other two is based are generally sufficiently explicit to make clear the mutual rights and duties of the parties, and their express or tacit recognition by other states gives them international validity. But a colonial protectorate is sometimes assumed without the conclusion of anything in the shape of an agreement; and in any case the agreements which may be entered into are not treaties in the strict sense of the word, since one of the parties is not a state. Justice demands that some sort of consent should be obtained from the tribes and chiefs who live in the protected territory. But as far as International Law is concerned the powers exercised by the protecting state spring, not from agreement, but from its own assumption of territorial rights which, though they fall short of complete sovereignty, look in that direction. We have, therefore, to inquire whether the common law of nations has associated any definite rights and obligations with origination and maintenance of a colonial protectorate. And the answer cannot be as clear and definite as might be wished, because the time that has elapsed since this particular kind of protectorate became common has not been long enough to enable a new

[1] *Statesman's Year Book, 1899*, pp. 336, 557.

[2] [See § 43.]

chapter of undoubted law to develop. In what follows we shall be indicating tendencies rather than laying down rules.

When a state has assumed a colonial protectorate, it would be well advised if it at once gave diplomatic notification of the fact to all the other members of the society of nations. The obligation to do so is confined to those powers who signed the Final Act of the West African Conference of 1885, and even in their case it is limited to protectorates on the coast of Africa. But the proceeding is so well calculated to avoid difficulties in the future, by giving to any power which has counterclaims to urge the opportunity of putting forward its objections before the new order has had time to take root, that the rule which insists on it might well be made universal in its application. The same Conference, while binding its members to keep reasonable order in any territory they might in future acquire by occupation on the African coast, declined to extend the obligation to protectorates.[1] [But the revising Conference of 1919 throws overboard, as between the parties to it,[2] this limitation; for by Art. 10 the signatory powers recognize the obligation to maintain "in the regions subject to their jurisdiction" an authority and police forces sufficient to ensure protection of persons and property, and, if necessary, freedom of trade and transit.][3] The question may arise at any moment whether native inhabitants of a protectorate are to be regarded as subjects of the protecting state if they are found in territory over which another civilized state exercises rightful authority. Hall declares that Germany would undoubtedly give an affirmative answer, and he expresses a conviction that other states would take the same view. There is no reason for questioning the correctness of either statement. We are therefore brought to the conclusion that all the inhabitants of a colonial protectorate are subjects of the protecting state for international purposes. Moreover it is clear that if a state were involved in war its colonial protectorates would be liable to attack from its foes, in the absence of any special agreement to the contrary, such as one of those contemplated by the eleventh article of the

[1] British Parliamentary Papers, *Africa*, No. 4 (1885), pp. 215–312.

[2] [See § 52.]

[3] [*Treaty Series*. 1919. No. 18. Cmd. 477.]

Final Act of the West African Conference, which stipulated that the territories comprised in the free trade zone created by the Act might be exempt by consent from warlike operations when the powers exercising the right of sovereignty or protection over them were engaged in hostilities.[1] These things being granted, it is difficult to see in what respects a protectorate of the kind we are considering differs internationally from an ordinary province or colony, or what advantage can accrue to a state from assuming such a protectorate instead of adding the country forthwith to its dominions by effective occupation. Protectorates over savage or semi-barbarous tribes are as a rule but temporary resting-places on the road to complete incorporation. If their position according to International Law is what we deem it to be, there seems no reason for halting at a halfway house which is exactly like the final goal.

§ 81

A state may exercise power over territory as (3) A sphere of influence.

A very limited amount of power may be exercised by a state over territory which is called a *Sphere of Influence*. The phrase was unknown till a few years ago, and even now it does not possess a clear and recognized technical meaning. Nevertheless the facts it denotes are neither so complicated nor so difficult to understand as those we have attempted to analyze in our explanation of the meaning of a protectorate. Over territory included in the sphere of influence of a state it does not necessarily exercise any direct control, whether in external or in internal affairs; but it claims that other states shall not acquire dominion or established protectorates therein, whereas it is free to do so if it chooses. It is clear that the validity of such a claim depends entirely on agreement. International Law confers on states a right to acquire unappropriated territory by occupation or set up a protectorate therein. But, in order to avoid a repetition on African soil of the disputes and

[1] *Supplement to the American Journal of International Law*, vol. III, p. 14. For the whole subject see Hall, *International Law*, 7th ed., §§ 38*, 38**; Westlake, *International Law*, part I, pp. 119–127; and Hall, *Foreign Jurisdiction of the British Crown*, pp. 204–227.

bloodshed which for three centuries made terrible the division of North America between English, French, and Spanish, the great maritime and colonizing powers have in recent times bargained with one another for the reservation of certain districts for themselves, on condition that they abstain in future from any attempt to take possession of districts similarly reserved for the other party or parties to the bargain. Such transactions have been very numerous during the past three decades, and most of them, though not quite all, refer to regions newly opened up in Africa. Good examples are to be found in the agreements made by Great Britain in 1890 with Germany, in 1891 with Portugal, in 1894 with Italy, and in 1898 with France, for the delimitation of their respective spheres of influence in the eastern, central, and western parts of the African continent. Such agreements cannot bind the civilized world, unless they are recognized by the other members of the family of nations. Their immediate legal effect is confined to the powers that signed them. But in several cases diplomatic recognition has been given, and in most of the others the recognition of tacit acquiescence. Doubtless in war a belligerent would strike at its adversary's spheres of influence, if opportunity offered; but there is little fear that the African districts reserved to one another in this capacity by European powers will be the cause of war in the immediate future. The claimants will find enough to do in gradually reducing them into effective possession. As protectorates are established in them and districts annexed by occupation, the protecting or annexing power acquires territorial rights independent of the original agreement as to the area within which it may operate without hindrance. But its right to deal with the rest of the area continues to rest on the stipulations by which its sphere of influence was marked out; and we may question whether such a right would be held to last for an indefinite time, if no serious attempt were made to act on it.

§ 82

The idea of applying to territorial transactions between states the conception drawn from Roman Law[1] of a separation

[1] Justinian, *Institutes*, bk. II, tit. iv.

between proprietorship and beneficial enjoyment is not altogether new, though in its developed form we do not find it till we come to comparatively recent times. In the Middle Ages a province was sometimes left in pledge, as when in 1294 Edward I of England allowed Philip IV of France to hold Gascony by his garrisons, pending a settlement of various disputes between the two monarchs. Of a later period it was possible to say in 1894, "The idea of occupation by mutual agreement for a fixed or uncertain period is by no means unknown to European International Law."[1] But the grant by one state to another of a town or district on a lease for years, or for a life or lives, does not come into notice till we examine the recent dealings of European states with the weak and decaying realms they encountered in their distribution among themselves of African territory.[2] For its most conspicuous examples, however, we must turn to Asia. In January, 1898, a treaty was negotiated between Germany and China whereby the latter leased to the former Kiao-chau Bay and the adjacent territory for a term of ninety-nine years. [The lease was renounced by Germany in favor of Japan by the Treaty of Versailles, 1919.] In 1898, Russia also obtained from China a similar concession. To quote the language of the official communication sent to the Russian press, "Port Arthur and Ta-lien-wan, with the territories adjacent thereto, and the territorial waters dependent thereon, have been ceded in usufruct to the Imperial Government for a term of twenty-five years, which may be extended later by common accord."[3] Great Britain followed by acquiring the port of Wei-hai-wei, on the same terms and for the same period as had been arranged for the Russian occupation of Port Arthur. In addition she obtained a lease for ninety-nine years of a strip of territory opposite her island of Hong Kong, in order to provide effectively for the defence of the city. France, not to be outdone by other powers, demanded and obtained a lease of the Bay of Kwang-chau-wan on the

A state may acquire power over (4) A leased territory.

[1] British Parliamentary Papers, *Egypt*, No. 2 (1898), p. 16.
[2] Westlake, *International Law*, part I, p. 133.
[3] London *Times*, March 30, 1898.

southern coast of China. In 1905, by the Treaty of Portsmouth, which terminated the war between Russia and Japan, the former power agreed to "transfer and assign" to the latter the lease of Port Arthur and the adjacent territory.[1] [China has extended the lease to ninety-nine years.][2]

We must now inquire into the precise legal effect of such concessions as have been enumerated. In private law both lease and usufruct imply that the property continues to belong to the grantor, while the grantee has the use and beneficial enjoyment of it for the time and under the conditions fixed in the grant. Are we then to say that Port Arthur, Wei-hai-wei, Kiao-chau, and Kwang-chau-wan are still Chinese territory, though Japan, Great Britain, and the other powers concerned exercise for a time important rights in them? If so, on what footing do other states stand in respect of their treaties of commerce with China, or with regard to their belligerent rights if they should be at war with China or with the lessee? As to the latter point, the experience of the Russo-Japanese struggle of 1904–1905, and of the great war, show conclusively that for all purposes of war and neutrality leased territory must be regarded as a part of the dominion of the power that exercises full control over it. In fact, the attempt to separate property or sovereignty on the one hand from possession on the other, by the use of phrases taken from the law of lease or usufruct, is in its very nature deceptive. The terms in question are mere diplomatic devices for veiling in decent words the hard fact of territorial cession. What China really parted with [for the period of the lease] was sovereignty, only it was not convenient at the time to say so, and no power but Germany said it.[3]

Hitherto we have been considering leases granted by a state that possessed undoubted sovereignty over the territory disposed of. But in 1894 Great Britain leased to the Congo Free State a portion of the sphere of influence in East Africa which had been recognized as hers by the agreements of 1890 and 1891, negotiated with Germany and Italy respectively. The

[1] Takahashi, *International Law in the Russo-Japanese War*, p. 775.
[2] [London *Times*, March 5, 1915.]
[3] Westlake, *International Law*, part I, p. 134.

area dealt with by the Anglo-Congo Convention had never been reduced into possession, and at the time, if it could be said to be ruled at all, it was in the power of the Khalifa and his hordes of barbarous dervishes. The western and much the larger part was leased for "so long as the Congo territories, as an independent state or as a Belgian colony, remain under the sovereignty of his Majesty (Leopold II of Belgium) or his Majesty's successors," while the eastern portion was made over only "during the reign of his Majesty," Leopold II. Moreover, the signatory powers expressly declared that they "did not ignore the claims of Turkey and Egypt in the basin of the Upper Nile." As soon as the agreement became known, France protested against it, and three months after it was signed, induced King Leopold to set it aside almost entirely. In consideration of concessions elsewhere, he promised to refrain from occupation and the exercise of political influence in the greater part of the leased sphere, retaining only the option of dealing with the district on the Nile of which Lado is the centre, afterwards known as the Lado Enclave. Then came the events of 1898 and 1899—the battle of Omdurman, the destruction of the power of the Mahdists, the seizure of Fashoda by a small French force under Major Marchand which had penetrated to the Nile through the leased territory, its withdrawal under pressure from Great Britain, the agreement between that power and France whereby the latter gave up all claim to the Upper Nile Valley, and the establishment of the *condominium* of England and Egypt over the reconquered Soudan, which included the districts we are discussing.[1] Into the controversy with France we need not enter here. But it is necessary to add that on the withdrawal of French influence, King Leopold endeavored to revive as against England the lease he had five years before made into a dead letter by agreement with France. On the other hand, Great Britain maintained that his conduct had forfeited his privileges under the lease, except as regards the Lado Enclave, and declined to surrender to him the rights of Egypt which he had joined in reserving when the agreement of 1894 was signed. After seven years of negotiations which

[1] British Parliamentary Papers, *Egypt*, Nos. 2 and 3 (1898).

have never been made public, a difficult and sometimes dangerous situation was terminated in 1906 by a second agreement, whereby the lease was annulled except as regards the Lado Enclave,[1] which, therefore, became Belgian territory when Belgium took over the Congo Free State in 1907 and reverted to Great Britain on the death of Leopold II in 1909.

Thus diplomacy and death settled a problem which law had wrestled with in vain. We have seen that a sphere of influence is a district reserved by a state for future absorption. Is it possible to lease what is not possessed by the lessor, to grant to another in usufruct that which is not held by the grantor? In the case before us this difficulty was accompanied by many others. Was France bound to respect boundaries agreed to by Germany and Italy, merely because she had not protested against them when first announced? Were the rights of Egypt in the Soudan destroyed by the Mahdist revolt, or only kept in abeyance? If they were still alive, could territories over which they existed be included in the sphere of influence of another state? If they were dead, could fresh rights over distant provinces be acquired by the victory of Omdurman and the capture of Khartum? Was England as lessor bound to guarantee to Leopold II as lessee tranquil enjoyment of the leased territory? Could it not be regarded as *res nullius*, and therefore open to seizure by the first comer? We shall make no attempt to unravel such a tangled skein. It is sufficient to say emphatically that, with this example before their eyes, states are not likely to repeat the experiment of leasing a sphere of influence.

§ 83

Less important modes of exercising power over territory.

In addition to the modes of exercising power over territory which we have already examined, a number of others exist, neither so frequently resorted to nor so important, but nevertheless deserving notice. A territory may be held in *condominium* by two or more powers, as is the case with the Soudan, which since 1899 has been so held by Great Britain and Egypt. By this is

[1] London *Times*, September 28, 1906.

meant, not that there are two sovereigns over the same territory,—a thing which by the nature of the case is impossible,—but that the one sovereignty is vested in a body made up of the governments of the two powers that exercise the *condominium*. In the case before us the question might arise whether a government that is not fully sovereign in its own territory is capable of exercising jointly or severally the powers of full sovereignty over another territory. But the discussion would be purely academic, because in practice Egypt is [now, according to the new declaration of British policy, (March, 1922) to be independent].[1]

Again, it is possible for a district or province to be in law a part of the dominions of one power while it is really governed by another. [Until its annexation by Great Britain in 1914, the island of Cyprus afforded an example.] In 1878 the Sultan of Turkey assigned it "to be occupied and administered by England" subject to certain conditions.[2] Occupation and administration are apt to lead in time to the assumption of full sovereignty, when the power that grants them is weak and the power that receives the grant is strong and desirous of expansion. This happened in 1908 with regard to Bosnia and Herzegovina, which Turkey gave over by the Treaty of Berlin of 1878 "to be occupied and administered by Austria-Hungary."[3] The Sultan's rights of sovereignty were reserved in the negotiations, especially by the Convention of 1879 between Austria-Hungary and the Porte;[4] but during the thirty years of her occupation the Dual Monarchy acted as sovereign, even to the extent of making treaty stipulations with regard to the two provinces, and in 1908 annexed them. It should be noted that occupation in the sense in which we have just used the term differs greatly from occupation regarded as a source of title to territory. The former refers to the mere physical possession exercised through civil or military agents, or both, and may take place with regard to countries that have been for centuries under the dominion of civilized states. The latter

[1] [See § 43.]

[2] Holland, *European Concert in the Eastern Question*, pp. 354–356.

[3] *Ibid.*, p. 292.

[4] *Ibid.*, p. 356.

signifies such possession *plus* the intention to hold the territory as one's own, and is a means of acquiring full sovereignty over districts that are technically *res nullius*.

Joint-sovereignty and the divorce of sovereignty from administration are obviously temporary expedients, and the same may be said of another device sometimes used with regard to territory when it is impossible to decide at the time where the sovereignty over it shall reside. For instance, in 1906 Great Britain and France, being unable to settle which of them should possess the New Hebrides and unwilling to leave them to anarchy, provided by convention that they should be jointly administered by a mixed commission. There are French and English courts, and a mixed court whose judge is a subject of neither power.[1]

Yet another mode of exercising power over territory is found in the engagements whereby a strong state has sometimes bound a weak one not to alienate the whole or a specified part of its dominions except to the state that receives its promise. Thus in 1884 France obtained from the International Association of the Congo, then about to become the Congo Free State, a right of preference if it should wish to part with its possessions,[2] and in 1898 China promised Great Britain by a formal agreement not to cede, lease or mortgage any part of the valley of the Yangtse-Kiang river to any other state. About the same time she made similar arrangements with France [3] and some other countries. The power thus gained over the territory that is the subject of the engagement is passive rather than active. It carries with it no present authority; but it contemplates the possibility of the exercise of authority in the future, should the state in possession break up, or be compelled to part with the territory designated in the agreement. At the time when China entered into the stipulations we have referred to, she seemed to be in imminent danger of disruption, and the states with world-ambitions were anxious to establish colorable claims which might be useful when the anticipated struggle for the

[1] *Statesman's Year Book, 1909*, pp. 341, 818.
[2] Nys, *Droit International*, vol. I, p. 103.
[3] *Ibid.*, vol. II, p. 103.

fragments of her empire began. These engagements cannot be held to have created anything more than a "questionable reversionary right."[1]

§ 84

Chartered companies and pioneer work.

Great Britain and other colonizing powers have adopted the policy of allowing chartered companies to undertake the first development of countries newly brought under their influence, protection, or dominion. Often indeed the company begins its work before the diplomatists step in to delimit the territories reserved for their respective states. We have already endeavored to fix the position of these companies in International Law.[2] It will be sufficient to add here that the control exercised over them by the mother-country can hardly be very real or very continuous; and that in her effort to escape responsibility by throwing it upon the shoulders of an association, she may often involve herself in transactions more dubious in character and more burdensome in execution than would have been possible had her control been direct. For instance, when in 1889 the natives of the German sphere of influence in East Africa attacked the stations of the German East Africa Company, the Imperial Government sent ships and men to assist in putting down the outbreak.[3] It could not look calmly on while its subjects were slaughtered by the natives; yet, had the administration of the district been in its hands, it would probably have avoided the high-handed measures on the part of the company's agents which were largely responsible for the rising. The history of the native kingdom of Uganda, in British East Africa, is another case in point. Under the régime of the British East Africa Company passions, political and religious, seem to have been aroused, which it proved entirely unable to restrain. The British Government was obliged to send agents of its own into the country, and assume a large control over its affairs in order to restore peace;[4] and in April, 1894, it resolved to establish a protec-

[1] Westlake, *International Law*, part I, p. 133.
[2] See § 42.
[3] *Annual Register, 1889*, pp. 301–304.
[4] *Ibid.*, 1892, pp. 342–345.

torate. Responsibilities it did not seek, but wished to avoid, were thrust upon it. Its hands were forced, and forced in consequence of the very device that was to extend the trade and influence of England without involving it in state efforts and state obligations. It is impossible for a government to grant to associations of its subjects powers that are hardly distinguishable from those of sovereignty, without sooner or later becoming involved in their proceedings, as in 1893 the British Government became involved, much against its will, in the war waged by the British South Africa Company against the Matabele and their chief, Lobengula.[1] A stronger case occurred when in December, 1895, a portion of the forces of the British South Africa Company commenced a lawless and unauthorized raid into the territory of the Transvaal republic. This outrageous proceeding involved the British Government in a maze of complications, and helped to bring about the Boer War of 1899–1902.

§ 85

We must now turn our attention to territorial rights over waters, and the claims of states to exercise sovereign authority in connection therewith. It was impossible to deal with these questions when we were discussing the limits of territorial possession; and they were reserved for consideration after we had investigated the subject of international title. The interest of some of them is chiefly historical, while others are matters of importance in our own day. We shall, however, be better prepared to grapple with the latter if we have some knowledge of the former.

Rights over waters. (1) Claims to sovereignty over the high seas.

We will take first the subject of

*Claims to sovereignty over the high seas.*

Originally the sea was perfectly free, though, as Sir Henry Maine justly says, it was common to all "only in the sense of being universally open to depredation."[2] In Roman Law it was one of the *res communes*.[3] But in the Middle Ages the

[1] *Statesman's Year Book, 1894*, p. 195.

[2] *International Law*, p. 76.

[3] Justinian, *Institutes*, bk. II, tit. i, 1.

maritime powers of Europe claimed to exercise territorial sovereignty over those portions of the high seas which were adjacent to their land territory or otherwise in some degree under their control. Thus Venice claimed the Adriatic, Denmark and Sweden declared that they held the Baltic in joint sovereignty, and England asserted a claim to dominion over the seas which surround her shores from Stadland in Norway to Cape Finisterre in Spain, and even as far as the coast of America and the unknown regions of the North.[1] Denmark put in a counterclaim to the Arctic seas, and especially to a large zone round Iceland where there were valuable fisheries. These claims, monstrous as they seem to us, were by no means an unmixed evil in mediaeval times, when piracy was a flourishing trade, and pirate vessels were strong enough to insult the coasts of civilized powers and make captures in their harbors. The state that claimed to possess a sea was held bound to "keep" it,—that is, to perform police duties within it,—and this obligation was fulfilled with more or less completeness by England and other maritime powers. Moreover, the claim to dominion was not deemed to carry with it a right to exclude the vessels of other nations from the waters in question. Tolls were often levied to provide the funds for putting down piracy and keeping the peace of the seas, and licenses to fish were given to foreigners in consideration of a money payment. In fact, no serious grievance appears to have been felt till after the discovery of America. That event gave a great impetus to trade and navigation, and at the same time excited a strong desire on the part of the Spaniards to be the sole possessors of the wealth of the New World. Accordingly, they not only claimed the Pacific Ocean as their own by right of discovery, but also strove to exclude from it the vessels of other powers. About the same time Portugal adopted a similar policy with regard to the Indian Ocean and the newly discovered route round the Cape of Good Hope. The other maritime nations set at naught these preposterous claims. French and English explorers traded, fought, and colonized in America with scant respect for the so-called rights of Spain; and Holland sent her

[1] Selden, *Mare Clausum*, bk. II, ch. i.

fleets to the Spice Islands of the East without troubling to ask leave and license of Portugal. The rulers and jurists of these aggressive nations sought a theoretical justification of their acts in the new doctrine, or rather the old doctrine revived, that the sea was incapable of permanent appropriation. Elizabeth of England told the Spanish ambassador at her Court that no people could acquire a title to the ocean, but its use was common to all. Grotius of Holland published a learned argument in favor of its freedom in 1609. He afterwards modified his views so far as to allow that gulfs and marginal waters might be reduced into ownership as attendant upon the land;[1] and in this latter form the principle of the freedom of the seas from territorial sovereignty became one of the fundamental doctrines of modern International Law. Selden in his *Mare Clausum*, published in 1635, supported the claim of England to dominion over the northern seas, but rather on the ground of immemorial prescription than on general principles. Even then the enforcement of such claims was against the spirit of the age, and they began to dwindle from the middle of the seventeenth century. For more than a hundred years after Great Britain had ceased to exercise any real powers of sovereignty over the seas she still called her own, she claimed within their limits ceremonial honors to her flag; and till quite recent times Denmark endeavored to reserve a large area round the coast of Iceland for the exclusive use of her fishermen. But the British demand for salutes and the lowering of the flag has been tacitly dropped for generations, and Denmark, after various concessions, gave up the struggle in 1872, and fell back on the three-mile limit allowed by International Law.[2]

[It has been pointed out that it would not be rational to consider the subsoil beneath the bed of the open sea as merely appurtenant to the sea itself, and therefore incapable of appropriation. For the principle which makes the open sea free to all is that it forms an international highway, and this of course has no application to the subsoil beneath its bed. The

[1] *De Jure Belli ac Pacis*, bk. II, ch. iii, 8.

[2] Hall, *International Law*, 7th ed., § 40.

question is of practical importance in relation to tunnels, and it has been suggested that, while the subsoil beneath territorial waters is also territorial, the subsoil beneath the open sea is a *res nullius*, and capable of acquisition through occupation by a maritime state excavating seawards from the subsoil beneath the bed of its territorial belt of water.][1]

§ 86

Rights over waters. (2) The American claim to prohibit seal-fishing in Bering Sea.

The last attempt to enforce exclusive claims over a portion of the open ocean was made by the United States in the controversy with Great Britain that terminated in the Bering Sea arbitration of 1893. In the year 1821 the Emperor Alexander I of Russia issued an ukase, prohibiting all foreign vessels from approaching within less than a hundred Italian miles of the coasts and islands belonging to Russian America. This proceeding was justified on the ground that Russia had a right to claim the Pacific north of latitude 51° as a *mare clausum*, on the ground of first discovery and the possession of both its shores. Great Britain and the United States at once protested against the ukase and the claims on which it was founded, the American secretary of state, Mr. John Quincy Adams, pointing out that the distance across the Pacific from shore to shore along the 51st parallel of north latitude was no less than 4000 miles.[2] The Russian Government yielded to the remonstrance of the two great commercial powers, and signed a Convention with the United States in 1824[3] and with Great Britain in the following year.[4] The terms of these instruments were almost identical. They conceded to citizens and subjects of both powers the right to navigate and fish without molestation in the waters closed to them by the ukase of 1821, and to resort to places on the coast where there was no Russian settlement for the purpose of trading with the natives. The main stipu-

[1] [Oppenheim, *International Law*, vol. I, § 287*c*.]

[2] *Treaties of the United States*, p. 1379. *British and Foreign State Papers*, vol. IX, p. 483.

[3] *Treaties of the United States*, p. 931.

[4] Wheaton, *International Law*, § 170.

lations remained in force till the United States acquired the whole of Russian America by purchase in 1867. A rapid development of the country then began, and among other enterprises the seal-fisheries were taken in hand with a view to their improvement. In 1870 a monopoly of the Pribyloff seal-rookeries was given by the American Government to the Alaska Commercial Company,[1] on condition that it paid certain sums annually to the United States Treasury, and killed no seals except on the islands, and not more than 100,000 a year even there. The sealing industry soon became exceedingly lucrative, and vessels from the maritime provinces of the Dominion of Canada were attracted to it. Their crews, not being bound by the restraints imposed by the law of the United States upon American citizens, killed the seals wherever they could find them outside the ordinary limits of territorial waters. The American sealers complained and protested; and in 1886 three schooners belonging to Victoria, British Columbia, were seized while fishing about seventy miles from land, and taken before the district court of Sitka for trial on a charge of infringing the law which forbade the killing of fur-seals within the limits of Alaska and its waters, except under authorization from the secretary of the United States Treasury. The judge who tried the case laid down in his charge to the jury that the territorial waters of Alaska included the whole of the vast area —1500 miles in width and 700 miles in depth—bounded by the limits mentioned in the treaty of cession of 1867 as those "within which the territories and dominions conveyed are contained."[2] Thus directed, the jury found the prisoners guilty, and the penalties of imprisonment for themselves and confiscation for their vessels and cargoes were enforced against them. Great Britain at once remonstrated. The seizure of other vessels elevated the difficulty to the rank of a great international controversy, which was carried on for several years and threatened more than once to disturb the peaceful relations between the two countries. Happily, however, it was

[1] Wharton, *International Law of the United States*, vol. II, p. 272.

[2] *Treaties of the United States*, p. 940; British Parliamentary Papers, *Correspondence respecting the Behring Sea Seal-Fisheries, 1886–1890*, p. 2.

referred to the arbitration of a board of seven jurists.[1] The award of this tribunal was given at Paris, on August the 15th, 1893. The arbitrators found for Great Britain on all the points of International Law in dispute.[2] They agreed that by the treaty of 1867 Russia ceded to the United States all her rights within the boundaries therein defined; but they held that the jurisdiction over enormous tracts of open ocean claimed by Alexander I in 1821 was not among those rights. International Law never gave it to Russia, and she could not cede what she did not possess. Accordingly, the territorial rights of the United States in the waters of Alaska were limited to its bays and gulfs, and the marine league along its shores. America had no property in the fur-seals when found outside those limits, and no power to protect them from seizure on the high seas by the citizens of other countries. At the same time, the tribunal recognized the force of the American contention, that it was necessary to put the fishery under regulations in order to preserve the seal-herd from grievous diminution, if not utter destruction. The treaty of reference gave the arbitrators power to devise such regulations, in case they declared Bering Sea open to the fishing vessels of all nations. They exercised this power, and drew up an elaborate code, which established a close time for seals, forbade their capture within sixty miles of the Pribyloff Islands, decreed that only sailing vessels should engage in the fishery, and laid down many other rules which the two powers brought into effect by means of domestic legislation in 1894.

It can hardly be doubted that the decision of the arbitrators was good in International Law. The claim to exercise rights hardly distinguishable from those of sovereignty over Bering Sea was contrary to principles that had been asserted by no power more vigorously than the United States;[3] and it was extremely difficult to reconcile the action of its government

[1] Message of President Harrison transmitting Treaty of Arbitration, February 9, 1892, to the Senate, March 8, 1892.

[2] London *Times*, August 6, 1893.

[3] Wheaton, *International Law* (Dana's ed.), p. 260, note 108; Wharton, *International Law of the United States*, vol. I, p. 105.

toward the British sealers with the attitude assumed by Mr. Adams in the controversy with Russia provoked by the ukase of 1821.[1] Nor will the contention that the seals were semi-domestic animals, and as such the property of the United States, bear investigation. They are wild creatures whom each may catch on his own territory or in localities belonging to no one. The United States can claim no rights over them after they have left American waters; for they are then as much beyond American authority as are the big game of the north-west plains when they have wandered across the border into Canadian territory.[2] But undoubtedly it had a strong moral claim on foreign nations for mutual agreement that should prevent the extermination of the seals. With this end in view the arbitrators drew up regulations, which, however, failed to effect their purpose, largely owing to the entrance into the sealing industry of Japanese, who were not bound by them. Russia concluded an agreement on the subject with Great Britain and the United States; but Japan refused her adherence. At last, in July, 1911, when the seal herd was almost destroyed, the four powers directly concerned agreed on the suspension of pelagic sealing for fifteen years. Here we have the beginning of "an International Game Law," which is undoubtedly the true solution of the difficulty.[3] This, and the decisive assertion of the freedom of the high seas, are likely to be the permanent results of the arbitration. Any claim on the part of the United States which might militate against the received doctrine seems to have been definitely abandoned in 1902, when the American agent in an arbitration with Russia was authorized to declare that "The government of the United States claims, neither in Bering Sea nor in its other bordering waters, an extent of jurisdiction greater than a marine league from its shores."[4]

[1] Wheaton, *International Law*, § 168; Wharton, *International Law of the United States*, vol. II, pp. 270, 271.

[2] British Parliamentary Papers, *Correspondence respecting the Behring Sea Fisheries, 1886–1890*, pp. 398–462; Moore, *International Law Digest*, vol. I, pp. 898–913, and *International Arbitrations*, ch. XVII.

[3] Moore, *International Law Digest*, vol. I, pp. 914–923; London *Times* of June 28, 1911.

[4] *Ibid.*, pp. 828–829.

§ 87

Rights over waters. (3) Claims to revenue and sanitary jurisdiction beyond the marine league.

[Claims to jurisdiction beyond the marine league for revenue and sanitary purposes have been made by states, and may be treated as distinct on the one hand from the now exploded claims over the high seas[1] and the doubtful assertions with respect to bays and gulfs.][2]

The British Hovering Acts of 1736 and 1784 assert a jurisdiction for revenue purposes to a distance of four leagues from the shore, and there are acts setting up a similar claim for health purposes. In 1797, 1799, and 1807 the United States Congress legislated to the same effect, and many maritime nations have embodied the like provisions in their laws.[3] Dana argues, however, that the right to make seizures beyond the three-mile limit has no existence in modern International Law, and maintains with regard to the Act of Congress of 1797, that it did not authorize the seizure of a vessel outside the marine league, but only its seizure and punishment within that limit for certain offences committed more than three miles, but less than twelve, from the shore.[4] It is very doubtful whether the claim would be sustainable against a remonstrance from another power, even in this attenuated form. When it is submitted to, the submission is an act of courtesy. As Twiss rightly and properly says: "It is only under the comity of nations in matters of trade and health, that a state can venture to enforce any portion of her civil law against foreign vessels which have not as yet come within the limits of her maritime jurisdiction."[5]

§ 88

The next subjects that demand attention are those connected with

*The right of innocent passage.*

This may be defined as the right of free passage through the territorial waters of friendly states when they form a channel

[1] [See § 86.] [2] [See § 72.]

[3] Wharton, *International Law of the United States*, § 32.

[4] Wheaton, *International Law* (Dana's ed.), p. 258, note.

[5] *Law of Nations*, vol. I, § 190. [Cf. Oppenheim, *International Law*, vol. I, § 190.]

of communication between two portions of the high seas. There can be no doubt that when both the shores of a strait that is not more than six miles across are possessed by the same power, the whole of the passage is regarded as territorial water; and there are instances of wider straits that are deemed to be under the power of the local sovereign. But these territorial rights do not extend to the absolute exclusion of the vessels of other states from the waters in question. In the days when whole seas were claimed in full ownership, the powers that owned narrow waterways were in the habit of taking tolls from foreign vessels as they passed up or down the straits. The most famous of these exactions were the Sound Dues levied by Denmark upon ships of other powers which sailed through the Sound or the two Belts, on their passage from the North Sea to the Baltic or from the Baltic to the North Sea. Their origin is lost in remote antiquity. The earliest treaties in which they are mentioned regard them as established facts and recognize the right of Denmark to levy them. In the Middle Ages other states negotiated with the territorial power as to their amount, and sometimes made war upon her to reduce exorbitant demands; but no one denied that a reasonable toll might lawfully be exacted. But with the growth of modern commerce these demands became increasingly irksome; and as the old idea of appropriating the ocean gave way to the doctrine that it was free and open to all, it was felt that the navigation of straits that connected two portions of the high seas was an adjunct to the navigation of the seas themselves, and should be as free in one case as in the other. Accordingly, in 1857 Denmark found herself unable any longer to levy the Sound Dues, though her jurists were able to show a clear prescription of five hundred years in her favor. By the Treaty of Copenhagen she gave them up.[1] A large pecuniary indemnity was paid to her by the maritime powers of Europe; but, in order to avoid recognizing by implication any right on her part, the covenanted sum was declared to be given as compensation for the burden of maintaining lights and buoys for the future. In the same year the

Rights over waters. (4) The right of innocent passage.

[1] Twiss, *Law of Nations*, vol. I, § 188.

United States negotiated a separate Convention with her, whereby all tolls on their vessels were abolished, and, in consideration of a covenant on the part of the King of Denmark to light and buoy the Sound and the two Belts as before, and keep up an establishment of Danish pilots in those waters, they agreed to pay him the sum of "three hundred and ninety-three thousand and eleven dollars in United States currency."[1] These instances show that the common law of nations now imposes upon all maritime powers the duty of allowing a free passage through such of their territorial waters as are channels of communication between two portions of the high seas. The right thus created is, of course, confined to vessels of states at peace with the territorial power, and is conditional upon the observance of reasonable regulations and the performance of no unlawful acts. It extends to vessels of war as well as to merchant vessels.[2] No power can prevent their passage through its straits from sea to sea, even though their errand is to seek and attack the vessels of their foe, or to blockade or bombard his ports. As long as they commit no hostile acts in territorial waters, or so near them as to endanger the peace and security of those within them, their passage is perfectly "innocent." The word, as used in the phrase "right of innocent passage," refers to the character of the passage, not to the nature of the ship.

§ 89

Rights over waters. (5) The special case of the Dardanelles and the Bosphorus.

It is sometimes supposed that the regulations [which, until after the great war, were] in force for the transit of vessels through the Dardanelles and the Bosphorus disprove the doctrine we have just laid down as to the extension of the right of innocent passage to ships of war. But a short historical examination of the case will show that it is exceptional, in that it is governed by special treaty stipulations and not by the ordinary rules of International Law. Till 1774, when Russia compelled

[1] *Treaties of the United States*, p. 239.

[2] [Jurists differ on this point. Oppenheim, *International Law*, vol. I, §§ 188, 195. Higgins, *Hague Peace Conferences*, pp. 340, 467. Hall, *International Law*, 7th ed., § 42.]

Turkey to open the Black Sea and the straits leading to it from the Mediterranean to merchant vessels, it had been the practice of the Porte, which did not consider itself bound by the public law of Europe, to forbid the passage of the Dardanelles and the Bosphorus to ships of other powers. After 1774 ships of war were still excluded; and in 1809 Great Britain recognized this practice as "the ancient rule of the Ottoman Empire." She was followed in 1840 by Austria, Russia, and Prussia, who were parties with her to the Quadruple Treaty of London; and France adhered to the arrangement in 1841.[1] The first subsidiary Convention attached to the Treaty of Paris of 1856 revised the rule so as to allow the passage of light cruisers employed in the service of the foreign embassies at Constantinople, and of a few small vessels of war to guard the international works at the mouth of the Danube. A further modification was introduced by the Treaty of London of 1871, which retained the previous rules, but reserved power to the Sultan to open the straits in time of peace to the war vessels of friendly powers, if he should deem it necessary in order to secure the observance of the Treaty of Paris of 1856.[2] These last two treaties were signed by the Great Powers, and were universally accepted as part of the public law of Europe.

The case of the Dardanelles and the Bosphorus was therefore an exception to ordinary rules, and instead of proving that the right of innocent passage does not extend to vessels of war, it proved the exact contrary; for, if the principle of exclusion applied under International Law, there would have been no need of a long series of treaties in order to bring it into operation. Russia sought to evade their restrictions in her war with Japan (1904–1905) by sending ships of her fleet from the Black Sea into the Mediterranean under her commercial flag, but with fighting crews on board and guns hidden in their holds, and then turning the vessels into warships when they reached open waters. But under the influence of strong representations from Great Britain, some of whose merchantmen had

[1] Holland, *European Concert in the Eastern Question*, pp. 95–101.

[2] Twiss, *Law of Nations*, vol. I, § 189; Holland, *European Concert in the Eastern Question*, pp. 256–257 and 273.

been captured by the converted cruisers, the attempt was abandoned.[1]

In 1912 this right of free navigation came in conflict with the right of self-defence, when Turkey mined the Dardanelles to prevent the passage of the Italian fleet to Constantinople; [and similar events occurred during the great war. The Treaty of Peace with Turkey after that war, signed at Sèvres Aug. 10, 1920 (but still unratified), throws open the Dardanelles, the Sea of Marmora, and the Bosphorus to both merchant and war vessels and aircraft, whether in time of peace or war. These waters cannot be blockaded, nor can any act of hostility be committed in them, except in pursuance of a decision of the League of Nations' Council. An International Commission is created for controlling them.][2]

§ 90

We now pass on to examine

*The position in International Law of interoceanic ship canals.*[3]

The construction of the Suez Canal raised a new question. Nothing like this great engineering work had been known since the modern law of nations came into being, and consequently that law contained no rules that were applicable to it. It runs through the territory of a state whose civilization is not in accordance with European models, and which, therefore, can hardly be trusted to exercise over it the full control of a territorial sovereign in the interests of European commerce. Further, it was made by a company under French influence, and is worked for profit under concessions [formerly obtained] from the Khedive of Egypt, confirmed by the Sultan [then the Suzerain power]. Moreover, the British Government has become a large shareholder in the company, and the position of the canal as part of one of the great trading-routes of the world gives it an international importance, and makes it an object of concern to the diplomacy of the maritime powers. It is *sui generis*, and its

Rights over waters. (6) The legal position of interoceanic ship canals.

[1] Lawrence, *War and Neutrality in the Far East*, 2d ed., pp. 200–218.

[2] [Arts. 37–61.]

[3] [See Whittuck, *International Canals* (1920).]

legal position cannot be defined apart from special agreement. It was opened in 1869; but not till 1888 did the powers of Europe agree upon the rules applicable to it, and embody them in a great international document. The intervening time was filled up with disagreements and negotiations, which proved conclusively the truth of the proposition, that International Law as it stood was unable to solve the difficulties of the case.[1] At last the principle of neutralization was applied to the canal by the Convention of October 29, 1888, which was signed by the six Great Powers of Europe, and also by Turkey, Spain, and the Netherlands. The states which possess the greatest political and commercial interests in the Canal have thus combined to define its legal status and lay down the international rules under which it is to be worked. Strictly speaking, their action does not bind the powers that were not parties to the Convention, but as none of these latter, except the United States and Japan, are of first-rate importance, and all have tacitly acquiesced in what was done [both by their general conduct, and (except in the case of the United States) by their participation after the great war in the various treaties of peace which refer to the Convention], the practical result is much the same as if the whole body of civilized states had formally expressed their adhesion to the new order. The Convention declares that the canal is to be open in time of war, as well as in time of peace, to all ships, whether merchantmen or vessels of war, whether belligerent or neutral; but no acts of hostility are to be committed either in the channel itself or in the sea to a distance of three marine miles from either end of it. The entrances to the canal are not to be blockaded; the stay of belligerent vessels of war, or their prizes, in the ports at either end of it is not to exceed twenty-four hours; and belligerents are not to embark troops or munitions of war within the canal or its ports. The right of Egypt and Turkey, as territorial powers, to take steps for the protection of the canal in the event of its being threatened is reserved, but hedged about with many securities and restrictions. [Turkey's powers with respect to the Convention have been assumed by Great Britain in consequence of

[1] Lawrence, *Disputed Questions in Modern International Law*, Essay II.

the great war. The transfer is recognized in the treaties of peace with Germany, Austria, Hungary, and in the unratified treaty with Turkey.] If it should be necessary to resort to force to provide for the safety of the waterway, permanent fortifications are not to be erected along it, nor must its free use for peaceful purposes be interfered with.[1] Great Britain accompanied her acceptance of the Convention by a reservation of her liberty of action in the state of transition through which Egypt was then passing.[2] But in 1904 by Article VI of the British and French Declaration respecting Egypt and Morocco she expressed her adherence to the stipulations of October 29, 1888, and agreed to their enforcement.[3] They had been observed in the intervening period, and there is now no obstacle to their observance in future as an important part of the conventional law of the civilized world. [We have seen that one of the conditions subject to which Great Britain in March, 1922, recognized the principle of Egyptian independence was the safeguarding of her communications in Egypt.][4]

By a treaty concluded in 1903 between the United States of America and Panama, "there is granted to the United States in perpetuity the use, occupation, and control of a strip ten miles wide and extending three nautical miles into the sea at either terminal, with all lands lying outside of the zone necessary for the construction of the canal or for its auxiliary works, and with the islands in the Bay of Panama."[5] In return for these concessions, an immediate payment of ten million dollars was to be made, and after nine years an annual payment of a quarter of a million dollars. [The Panama Canal was opened in 1914, and thereupon] the Hay-Pauncefote Treaty of 1901 came into operation. It superseded the Clayton-Bulwer Treaty of 1850, and laid it down that the "exclusive right of providing for the regulation and management of the canal" is conceded to the United States, who may police it, and who

[1] British Parliamentary Papers, *Egypt*, No. 2 (1889).

[2] Moore, *International Law Digest*, vol. III, p. 263.

[3] The *Declaration* is printed in the Appendix to volume I of Oppenheim's *International Law*, and in volume I of the *Supplement to the American Journal of International Law*.

[4] [See § 43.]

[5] Message of President Roosevelt, December 7, 1903.

claim the right to fortify it also. The rules which control the navigation of the Suez Canal are applied *mutatis mutandis* to the Panama Canal; and it is stated in the first of them that "the canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation."[1] A controversy arose between Great Britain and the United States as to the meaning of these words. The American Congress passed an Act exempting vessels engaged in the coasting trade of the United States from the tolls to be levied on vessels of other nations. Great Britain declared that this amounted to "discrimination," such as is forbidden by the Treaty, while President Taft maintained that his country was free to deal in this way with its own ships. [The controversy was settled in 1914 by fresh legislation.] Great Britain and the United States are the only parties to the Hay-Pauncefote Treaty; but since they embodied in it provisions already accepted with regard to the Suez Canal, no objections were raised against similar provisions when applied to the only other canal of the like kind on the face of the earth. Both canals differ from the Kiel Canal [which, by the Treaty of Versailles, 1919, was thrown open to the merchant and war vessels of all nations at peace with Germany] and the Corinth Canal, in that they are not the work of the local sovereign, and therefore not under his exclusive control. Accordingly, they required the creation of new rules applicable to them alone. The question whether they have been really neutralized will be discussed later .[2]

§ 91

The next subject we have to discuss under the head of territorial rights over waters and the questions connected therewith is

*The use of sea fisheries.*

The rules of International Law with regard to them are simplicity itself. Within the territorial waters of a state its

[1] Moore, *International Law Digest*, vol. III, pp. 54, 219–221; Oppenheim, *The Panama Canal Conflict.*

[2] See § 227.

subjects have exclusive rights of fishing, but outside territorial waters, on the high seas, subjects of all states are free to fish on the one condition that they do so peacefully. These rules are, however, often modified by Conventions giving to subjects of one power the right to fish in certain specified portions of another's marginal waters; and sometimes controversies arise as to the meaning and extent of such concessions. Moreover, fisher folk are apt to quarrel among themselves in places where the subjects of two or more states have rights in common. To settle these disputes often requires a good deal of negotiation, and the simple precepts of the common law of nations are interpreted and overlaid by a large number of conventional rules. We have already seen how this may take place, when we gave an account of the Bering Sea dispute in connection with the subject of claims to dominate open waters.[1] The North Sea Fisheries Convention of 1883 will afford another illustration. It provides, among other things, for the police of the fishing grounds in the North Sea which, being outside territorial waters, are enjoyed in common by the subjects of all the signatory powers. The contracting parties agree to send cruisers to enforce the regulations laid down in the Convention, and in serious cases to apprehend offenders and take them into one of the ports of their own country for trial.[2] No grave international disagreement exists in connection with these fisheries; but till lately, Great Britain and France were engaged in a serious and long-standing dispute with regard to the exact nature and extent of the rights given to French fishermen along a portion of the coast of Newfoundland by the Treaty of Utrecht and subsequent agreements. The matter was, however, amicably settled in 1904 by the renunciation on the part of France of the greater part of her rights along what was called the Treaty Shore, on condition of certain territorial compensations in West Africa and pecuniary indemnities for such of her citizens as were obliged to abandon their establishments on the Newfoundland coast.[3] The questions concern-

Rights over waters. (7) The use of sea fisheries.

[1] See § 86. [2] Hertslet, *Treaties*, vol. xv, p. 794 *et seq.*

[3] *Supplement to the American Journal of International Law*, vol. I, pp. 9–13.

ing the Canadian fisheries, which have from time to time arisen between Great Britain and the United States, have at last reached a final and satisfactory settlement. In further illustration of the subject we will give a brief account of the diplomatic history of this important matter.

By the treaty of 1783, which recognized the independence of the United States, their inhabitants were granted rights of fishing on "such part of the coast of Newfoundland as British fishermen shall use," and also on the coasts of all other British dominions in North America.[1] During the War of 1812 these rights could not be exercised. The Treaty of Ghent, which concluded the struggle in 1814, was silent upon the subject of the fisheries; and in consequence a controversy arose between the two governments. The United States claimed that the treaty of 1783 did but recognize fishing rights that existed independently of it, and therefore remained intact even if the fishery clause in it were abrogated by the war. The British held that the rights in question were created by the treaty, and fell to the ground when the outbreak of war destroyed the clause on which they rested. The matter was settled for a time by the treaty of 1818, by which it was agreed that citizens of the United States should have in future the liberty of taking fish of every kind on a clearly defined part of the coast of Newfoundland, and also on the southern and eastern coasts of Labrador, but not in the territorial waters of other portions of the North American possessions of Great Britain. American fishermen were "to have liberty forever to dry and cure fish in any of the unsettled bays, harbors and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador," but were to lose this privilege as soon as the inlets became settled, unless the inhabitants chose to allow them to land as before. With regard to other bays and harbors, the fishermen of the United States were to be permitted to enter them "for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever."[2] This treaty is important, because the subsequent diplomatic history of the

[1] *Treaties of the United States*, p. 377.

[2] *Ibid.*, pp. 415, 416.

question hinges on it. All other arrangements proved to be temporary, and when they one by one disappeared, the powers concerned were thrown back upon its stipulations. Unfortunately, the progress of settlement, and the changes both in British commercial policy and in methods of fishing, have rendered it very inadequate to the conditions under which the industry is pursued in modern times, and in addition complications arose as to the meaning to be attached to the phrase "coasts, bays, creeks, or harbors," and also as to the validity of fishing regulations made by the Newfoundland government. The English authorities were disposed to claim wide inlets, and great expanses of water as British bays from which American fishermen were excluded by the terms of the treaty, while the authorities of the United States endeavored to restrict British bays within narrow limits and place the widest construction upon the rights accorded to their fellow-citizens in them. Various temporary arrangements were made, including the Treaty of Washington, 1871,[1] in which there was a virtual abandonment of the original contention that the inhabitants of the United States had a right apart from treaty stipulations to share in the British fisheries.[2] At length the two powers referred the questions at issue to an arbitral tribunal appointed under the provisions of the Hague Convention of 1907 for the peaceful adjustment of international disputes. Its award, a magnificent piece of judicial reasoning, was given in the North Atlantic Coast Fisheries Arbitration, 1910. It adopted in the main the British contentions as to the extent of the bays from which American fishermen are excluded; and it rejected the American claim to restrict the sovereignty of Great Britain in the territorial waters affected by the controversy, but gave to a mixed commission of experts the right of pronouncing on the reasonableness of British regulations made to control the fisheries therein.[3]

[1] *Treaties of the United States*, pp. 486–488.

[2] For the whole subject see Moore, *International Law Digest*, vol. I, pp. 767–874; Wheaton, *International Law* (Dana's ed.), pp. 342–350 and note 142; Hall, *International Law*, 7th ed., § 27.

[3] For the full text of the Award see *American Journal of International Law*, vol. IV, pp. 948–1000.

§ 92

The last point we have to consider in connection with our present subject is

*The navigation of great arterial rivers.*

Rights over waters. (8) The navigation of great arterial rivers.

With regard to these we must distinguish between what are now called *international rivers*, and great navigable streams that from source to mouth flow through the territory of one state only. By the former we mean rivers that are highways of commerce and run through the territory of two or more states, or form a boundary between states, or both. In their case there can be no doubt that each state possesses territorial rights over that portion of the river which is entirely within its own boundaries. But have all the riparian states a right to navigate the whole river, or may each exclude the vessels of the others from its own portion of the waterway? There is no general agreement among authoritative writers on International Law with regard to this question. Some hold that there is a right of navigation,[1] others deny the existence of anything of the kind,[2] while a third school declare that the right is imperfect,—an adjective which may mean either that the right is real but its enjoyment must normally be regulated by agreement,[3] or that it cannot be exercised unless the safety and convenience of the state according it is secured by special Convention.[4] This last version of the doctrine of imperfect right seems self-contradictory; for a right that cannot be insisted upon is no right at all, but a mere permission depending on good will. The other two schools derive opposing doctrines from irreconcilable assumptions. The principle that every state has an unlimited proprietary right to its land and water leaves no room for a servitude of innocent passage over international rivers. The principle that the general convenience

[1] *E.g.* Bluntschli, *Droit International Codifié*, § 314.

[2] *E.g.* Twiss, *Law of Nations*, vol. I, § 145; [Oppenheim, *International Law*, vol. I, §§ 177–178; Hall, *International Law*, 7th ed., § 39].

[3] Westlake, *International Law*, part I, pp. 154, 157.

[4] Wheaton, *International Law*, § 193.

of mankind overrides all particular privileges renders meaningless the assertion that states have an exclusive right to their own territory. But International Law is not deduced from assumed premises. It is based on the practice of nations; and we must examine the cases that have occurred, and endeavor to obtain from them some consistent rule. We find that the great European rivers that run through the territories of more powers than one were subject to tolls till the beginning of the nineteenth century. But in 1804 the Congress of Rastadt abolished the Rhine tolls; and in 1815 the Congress of Vienna decided that the great rivers of Western Europe should for the future be open to navigation, and that the tolls to be levied on each of them should be settled by common accord among the riparian powers. Accordingly the Rhine, the Elbe, and other rivers were at various times after 1815 opened to free navigation on payment of such moderate dues as were sufficient to recoup the territorial powers for their expenditure upon the waterway.[1] In the negotiations connected with these agreements a question of the first importance emerged from the crowd of details. Was the stipulated freedom to be confined to vessels of the states through whose territories the river flowed, or was it to include those of other states who might desire to enter the river from the sea? Practice varied during the first half of the nineteenth century; but in 1856 the great international Treaty of Paris opened the Danube to the flags of all nations, and the concession was interpreted in the widest sense by the signatory powers. A European commission was charged with the duty of executing the necessary engineering works at the mouth of the river, and permitted to levy tolls sufficient to pay their cost. The authority of this commission has been continued and increased by a series of international agreements, the last of which, made [by the Treaty of Peace with Germany, 1919, continues the commission, but limits its composition, as a provisional measure, to representatives of Great Britain, France, Italy, and Rou-

[1] Hall, *International Law*, 7th ed., § 39. [See the Treaty of Versailles, 1919. Arts. 354–362 and E. Borel in *British Year Book of International Law* (1921–1922), pp. 75–89.]

mania; from the point where the competence of the commission ceases, the Danube system is placed under the control of an International Commission. In the same treaty, portions of the Elbe, Oder, Niemen and Danube, and all navigable parts of these river systems which provide more than one state with access to the sea, are declared "international." On them, subjects, property, and flags of all powers are to be given perfect equality of treatment. Charges, if not precluded by existing conventions, may be levied on vessels using the rivers, but only for keeping their waters navigable. Each riparian state must remove any obstacle or danger to navigation. Moreover, these arrangements are to be superseded by others to be laid down in a General Convention, drawn up by the allied and associated powers and approved by the League of Nations, with respect to any waterways which the proposed Convention shall recognize as international.[1] When it is considered that nearly every important power, except Russia, interested in the river systems named, was either a party to this treaty, or to later treaties of peace which incorporate these provisions by reference, it is obvious that a great advance was made on previous practice, and that this is one of the parts of the Treaty of Versailles which must be regarded as law-making.]

[Further provisions on this matter were made by the Barcelona Conference on Communications and Transit, which met on March 10, 1921, in pursuance of Article 23 of the Covenant of the League of Nations, 1919, for the purpose of securing and maintaining freedom of communications and transit. By the Danube Statute, it made the International Commission of the Danube a permanent institution composed of two representatives of Germany, and one from each of the other riparian states and from each non-riparian state which is at any time represented on the European Commission; and it conferred on the Commission general supervisory powers and imposed on it the duties of framing police and navigation regulations and the execution of works. This by no means exhausted the topics dealt with at the Conference. Representatives of 44 states (which, however, did not include the

[1] [Arts. 331–339.]

United States) attended with the view of considering waterways and transit generally. A committee of sixteen members, with a permanent secretariat at Geneva, was created to make proposals for future conventions on communications and transport, and to inquire into disputes between members of the League of Nations arising out of these matters. This part of the work of the Conference is now operative. But the following Conventions are not binding until they are ratified. The Convention on Transit provided by a "Statute" for the facilitation of traffic in transit by rail or water when the points of departure and destination lie outside the territory of the State through which transit takes place. The Convention was qualified by many exceptions, and is only to apply in time of war so far as the rights and duties of belligerents and neutrals admit. Disputes as to its interpretation must be referred to the Permanent Court of International Justice. Another Convention embodied a "Statute" which, subject to many conditions, guaranteed the right of navigation for vessels of all flags on "waterways of international concern." A further piece of legislation by the Conference was a declaration recognizing the right of states having no sea coast (e.g., Switzerland, Czecho-Slovakia) to fly a flag.][1]

Outside Europe we find the same tendencies at work with regard to the great arterial rivers of the American continent. When the United States obtained formal recognition of their independence from Great Britain in 1783, Spain held Louisiana and Florida and thus possessed both banks of the Mississippi at its mouth and for a considerable distance inland. The American Government claimed for its citizens free navigation to the sea as a right; but after long negotiations the dispute was terminated in 1795 by the Treaty of San Lorenzo el Real, which provided that the navigation of the river from its source to its mouth should be free as a concession to the subjects and citizens of the two powers.[2] With regard to the St.

[1] [*League of Nations. Treaty Series*, vol. VII, Nos. 171–174. See G. E. Toulmin, in *British Year Book of International Law* (1922–1923), pp. 167–178. Sir Cecil J. B. Hurst. *Ibid.* (1921–1922), pp. 174–175.]

[2] Twiss, *Law of Nations*, vol. I, § 145; *Treaties of the United States*, pp. 1007, 1382–1384.

Lawrence events followed a similar course. The United States asserted and Great Britain denied, that American citizens had a right by the law of nations to navigate that portion of the river which flows entirely through Canadian territory. The Reciprocity Treaty of 1854 granted the privilege demanded, in return for a grant to British subjects of freedom to navigate Lake Michigan, but reserved a right of suspending the concession on giving due notice; and finally by the Treaty of Washington of 1871 the navigation of the British portion of the St. Lawrence was thrown open "forever" to citizens of the United States. The concession, however, did not include subjects of other countries, though it did extend to three other rivers, the Yukon, the Porcupine, and the Stikine.[1] In 1909 the navigation and use of boundary waters was regulated by treaty between the two powers.[2] The international rivers of South America have been thrown open to vessels of all nations, sometimes by agreement, as when in 1853 England, France, and the United States secured the freedom of the Parana and the Paraguay by treaty with the Argentine Confederation, and sometimes by unilateral act, as when in 1867 the Emperor of Brazil opened the Amazon by decree.[3] With regard to Africa, the Final Act of the West African Conference of 1885 decreed that the Congo, the Niger, their affluents, and with few reservations all the rivers of the Free Trade Zone created by Article I, should be freely open to the merchant ships of all nations.[4] [This is practically repeated with amendments in the revising convention of 1919.][5]

We venture to draw from the facts just recited the conclusion that, with regard to the navigation of rivers that traverse more countries than one, International Law is in a state of transition. Strictly speaking, a state possessed of one

[1] Moore, *International Law Digest*, vol. I, pp. 626–636; *Treaties of the United States*, pp. 488, 489.

[2] *Supplement to the American Journal of International Law*, vol. IV, pp. 239–249.

[3] Hall, *International Law*, 7th ed., § 39.

[4] *Supplement to the American Journal of International Law*, vol. III, pp. 10–23; British Parliamentary Papers, *Africa*, No. 4 (1885), pp. 308, 311.

[5] [See § 52.]

portion of such a river can exclude therefrom the vessels of the co-riparian powers, unless a right of navigation has been granted to them by treaty. Yet as a matter of comity, hardly to be distinguished from obligation, it does not withhold such right, nor does it levy tolls for any other purposes than to provide lights and buoys, and cover the incidental expenses of keeping the waterway in good condition. The tendency in favor of freedom of navigation is so strong that any attempt to revive the exercise of the right of total exclusion, or even to levy toll for profit, would be regarded as an aggression. Usage is turning against the ancient rule. It is now set aside by treaty stipulations; but in time the new usage founded on them will give rise to a new rule, and no treaty will then be required to provide for the free navigation of an international river by the co-riparian states, while in all probability the vessels of other nations will be allowed to come and go without let or hindrance. It is, and no doubt will remain, an admitted principle that the right of traversing the stream carries with it the right of using the banks for purposes incidental to navigation.[1]

With regard to great arterial rivers which run in their entire course through the territory of one state, it must be allowed that the power of exclusion still remains unfettered. Some states have adopted a policy of free admission, while others have restricted navigation to vessels owned by their own subjects. On the facts as they stand, it would be difficult to maintain that there was even an inchoate right of admission vested in foreign ships.

[1] For a learned and exhaustive discussion of the subject see Westlake, *International Law*, part I, ch. vii, and Nys, *Droit International*, vol. III, pp. 109–131; [Kaeckenbeeck, *International Rivers*].

## CHAPTER III

### RIGHTS AND OBLIGATIONS CONNECTED WITH JURISDICTION

§ 93

THERE are two principles either of which could be made the basis of a system of rules with regard to jurisdiction. It might be held that the authority of the state should be exercised over all its citizens wherever they may be found, or that it should be exercised over all persons and all matters within its territorial limits. Modern International Law, being permeated throughout by the doctrine of territorial sovereignty, has adopted the latter principle as fundamental. But, inasmuch as it could not be applied at all in some cases, and in others its strict application would be attended with grave inconvenience, various exceptions have been introduced, based upon the alternative principle that a state has jurisdiction over its own subjects wherever they may be. All that we can venture to put forth in the way of a broad general proposition is that jurisdiction is in the main territorial. In order to deal with the subject properly, we must attack it in detail; and the first rule we will lay down is that A STATE HAS JURISDICTION OVER ALL PERSONS AND THINGS WITHIN ITS TERRITORY. There are a few exceptions; but we will not consider them till we have dealt with the general principles.

A state has jurisdiction over all persons and things within its territory, with a few exceptions.

§ 94

Among the persons who, being within the state's territory, are subject to its jurisdiction, the first class to be considered consists of its *natural-born subjects*. Each country defines for itself by its municipal law what circumstances of birth shall make a person its subject. It may consider the locality of the birth to be the all-important point, making a subject of every child born within its territory. no matter whether the parents are natives or foreigners;

Natural-born subjects.

or it may regard the nationality of the parents, or one of them, as the determining circumstance, making subjects of the children of subjects, wherever born, and aliens of the children of aliens, wherever born. Both principles give the same result in the case of those born within the state of parents who are its subjects, and such persons will always form the vast majority of the inhabitants of any but a very new country. There can be no doubt that they are natural-born subjects, whether the law of the land adopts the first or the second of the views just enunciated. But in other cases these principles lead to different results. For instance, those born outside the state's territory of parents who belong to the state, are aliens according to the first principle, but subjects according to the second; and those born within the state's territory of parents who do not belong to the state, are subjects according to the first principle, but aliens according to the second. States are free by virtue of their independence to adopt in these matters what principles they please, and they embody in their laws a great variety of rules. The result is that conflicting claims and difficulties of all sorts arise on the subject of nationality and citizenship. England and the United States, for instance, adopt with regard to children of their own subjects and citizens the rule of nationality. Though born abroad they are British or American subjects as the case may be.[1] But by an Act of Congress passed on March 2, 1907, in order to receive the protection of the United States all children born abroad of American citizens must, on reaching the age of eighteen, record at an American consulate their intention and desire to remain citizens of the United States and to become resident therein. They must also take the oath of American allegiance at the age of twenty-one. With regard to the children of foreigners the two countries adopt the principle of locality, and claim as their own the children born within their dominions.[2] France used to adopt for all purposes the principle

[1] 4 & 5 Geo. v, c. 17, sect. 1; *Revised Statutes of the United States*, §§ 1993, 2172.

[2] *Constitution of the United States*, 14th Amendment; [4 & 5 Geo. v, c. 17, sect. 1;] *Calvin's Case*, for which see Howell's *State Trials*, vol. II, p. 559, and Broom's *Constitutional Law*, p. 4.

of nationality, and held children to be subjects of their parents' state, wherever they were born.[1] But by the laws of 1889 and 1893 great concessions were made to the principle of locality, or, in other words, the *jus sanguinis* was largely modified by the *jus soli*. At the present time any person born of foreign parents on French soil is French if one of his parents was born in France. Should, however, that one be the mother, he may disclaim French nationality at any time during the year after his twenty-first birthday and retain the nationality of his parents.

From the brief outline we have just given it is obvious that persons of double nationality may often be found. For instance, a child born in England of French parents would be a British subject according to the law of England, and a French subject according to the law of France. In such cases there is evident danger of serious complications if each state acts upon its extremest rights. But difficulties are generally avoided by the tacit consent of each to attempt no exercise of authority over such a citizen as long as he remains outside its borders, and to make no objection to the exercise of authority over him by the other while he resides within its limits. And further, the laws of several countries give to persons of double nationality a right of choice on arriving at years of discretion, though it is, of course, possible that the option may not be exercised. Thus in England the child of [a former British subject] may elect to [resume British nationality within one year of coming of age].[2]

§ 95

Naturalized subjects.

The class next in importance of those who being within the territory are under the jurisdiction of the state consists of *naturalized subjects*. They are persons between whom and the state the tie of allegiance has been artificially created by a process termed *naturalization*. Sometimes naturalization takes place without any special formalities as an inseparable incident of something else. For in-

[1] *Code Civil*, I, I, i, 10.

[2] [4 & 5 Geo. v, c. 17, sect. 12.]

stance, the inhabitants of territory acquired by conquest or cession become *ipso facto* subjects of the state to whose rule they are transferred, though a conditional right of option has been generally granted in modern times.[1] Moreover, when a subject marries a foreign woman, by the law of most countries the wife acquires the nationality of her husband and loses her own. The United States, however, does not look upon an American woman married to a foreigner as subject to all the disabilities of alienage, though it regards a foreign woman married to an American as an American subject.[2] And by the Act of Congress of 1907 referred to in the previous section the American-born wives of foreigners may, when widowed or divorced, recover full American citizenship, though still resident abroad, by registering as citizens before a consul of the United States within a year after the termination of the marriage. By the same act, the foreign-born wives of Americans can in similar circumstances retain by a like registration the American citizenship they gained by marriage.

But naturalization is usually effected by a separate formality, which takes place when a foreigner situated in a country wishes to acquire therein the rights of citizenship. It is the policy of most states to put little difficulty in the way of the reception of new subjects under such circumstances, though many of them dislike the naturalization of their own subjects in foreign states. International Law prescribes no general formalities for use when a change of allegiance is effected; but the law of each state lays down the conditions on which it will receive foreigners into the ranks of its citizens. Thus in the United States the general rule, to which, however, there are several exceptions, is that the alien who wishes to become a citizen must have resided in the country and been of good behavior for at least five years, and have made a declaration of intention to become a citizen at least two years before admission to citizenship. At such admission he must take the oath of allegiance, and forswear allegiance to the country of his birth. He must also renounce any hereditary title he may

[1] See § 49.

[2] Moore, *International Law Digest*, vol. III, pp. 448–454.

possess.[1] In England till 1870 naturalization could be effected only by a private Act of Parliament; [the Naturalization Act of that year, which introduced general provisions on the subject, was repealed by the British Nationality and Status of Aliens Act, 1914, and the present statute law is contained in this Act and an amending Act of 1918. The grant of a certificate of naturalization (which is in the absolute discretion of the Secretary of State) may be made to an alien who satisfies the Secretary of State that (a) he has resided in His Majesty's dominions at least five years (the year preceding the application must have been spent in the United Kingdom or in the service of the Crown, and residence during the remaining four years must have taken place within eight years before the application); or has been in the service of the Crown at least five years within the eight years preceding the application; (b) he is of good character, and has an adequate knowledge of the English language; (c) he intends to reside in His Majesty's dominions, or to enter or continue in the service of the Crown].[2] India and the Colonies have laws of their own with regard to naturalization in them. The legal effects of naturalization, in so far as they concern the person naturalized in his relation to the state of his choice, are determined exclusively by its law. He has to fulfill all the duties of a natural-born citizen, yet some states do not grant him all the political rights of one. In England all political disabilities have been removed since 1870. In the United States all Federal offices, except those of President and Vice-President, are open to naturalized citizens.[3]

§ 96

International questions may arise when a naturalized subject of a state returns to the country of his original allegiance and claims to be treated there as a citizen of his new country. Is he to be so regarded, or is he rightly made to perform towards the state of his birth all the obligations of

[1] *Revised Statutes*, title XXX, Naturalization. See also *American Journal of International Law*, vol. XII, p. 613.

[2] [4 & 5 Geo. V, c. 17. 8 & 9 Geo. V, c. 38.]

[3] *Constitution of the United States*, art. II, § 1.

a citizen while he resides within its territory? The practice of states is diverse on this point, and the most conflicting views have been enunciated. The laws of civilized countries differ both as to the position they take towards their own citizens naturalized abroad, and as to the protection they afford to foreigners who have become their citizens by naturalization. With regard to the subject who has acquired a foreign nationality, we find that most states hover between the old doctrine of inalienable allegiance, set forth in the maxim, *Nemo potest exuere patriam*, and the "right of expatriation" which has been asserted by the Congress of the United States in a statute of 1868 to be "a natural and inherent right of all people."[1] Some states, like Italy,[2] still regard him as subject to military service, and several consider him to be punishable with death if he bears arms against his native country. In the converse case of a citizen of a foreign country who has become a naturalized subject, some states regard him as entirely and for all purposes on an equality as to rights and protection with their born subjects, while others recognize that the country of his birth still has rights against him, which it may enforce if he goes within its territory. The legislative department of the United States Government seems to be in advance of the executive in its doctrine of a natural right of expatriation. Mr. Wheaton, when Minister at Berlin in 1840, refused to take up the case of J. P. Knacke, a Prussian who had been naturalized in the United States and had returned to Prussia. He was there compelled to serve in the Prussian army, and Mr. Wheaton held that the United States could not interfere to protect him in the country of his birth. Mr. Webster took similar ground when secretary of state in 1852, in the cases of Ignacio Tolen, a Spaniard, and Victor Depierre, a Frenchman. But General Cass, who held the same high office in 1859, drew a distinction in the case of Hofer, a Prussian, between inchoate and perfect obligation, and claimed a right to protect naturalized citizens in the countries of their birth unless the offense was complete

International questions connected with naturalization.

[1] *Revised Statutes*, § 1999.

[2] *Appendix to the Report of the Naturalization Commission*, p. 28.

before expatriation. The Prussian Government declined to admit this contention, but gave a discharge from the army at the request of the United States Minister, thus granting as a favor what it refused as a right.[1] The executive department has retained the position taken up by General Cass, and has succeeded in getting it embodied in several treaties, but nearly all of them provided that naturalized citizens may be tried on their return to their fatherland for offences against its laws committed before their emigration. In the Austrian treaty and three others special mention was made of military service, and it was stipulated that the obligation must have actually accrued before emigration in order to render the offender liable to trial and punishment on his return for his attempted evasion of it. The possibility of a future call to service was not enough. The call must actually have been made.[2] France, under her law of 1889 as diplomatically interpreted in 1901, holds that a Frenchman naturalized abroad without the consent of his government does not lose his quality of Frenchman, and if he returns to France, will be punished for failure to perform military service and called on to perform it, should he have been subject to it at the date of his naturalization.[3] With England the question does not arise, since she does not resort to conscription to fill the ranks of her army.

Till recently the law of Great Britain embodied the doctrine of inalienable allegiance; and one of the chief causes of the war with the United States in 1812 was the rigor with which that doctrine was applied by her government. British cruisers took from American vessels on the high seas naturalized American citizens and impressed them for service in the royal navy, on the grounds that they were British subjects by birth and that no forms gone through in America could divest them of their British nationality. But practice softened as the century wore on, and gradually opinion changed, till by the Naturalization Act

[1] Halleck, *International Law* (Baker's ed.), vol. I, pp. 411–413; Wheaton, *International Law* (Dana's ed.), p. 142, note; Wharton, *International Law of the United States*, § 181.

[2] *Treaties of the United States*, pp. 37, 38, 43, 67, 1070.

[3] Moore, *International Law Digest*, vol. III, pp. 599–601.

of 1870 [1] the old doctrine of the common law was abandoned, and Great Britain recognized the naturalization of her subjects abroad. The act laid down that they lost their British citizenship by voluntarily assuming citizenship in another state; and, with regard to naturalized citizens of Great Britain, it declared that they would be protected wheresoever they might be except in the country of their original allegiance. [This exception does not appear in the British Nationality and Status of Aliens Act, 1914, which repeals the Act of 1870, and merely enacts that a naturalized subject shall be entitled to all the political rights of a natural-born British subject. The provision of the older Act as to the abandonment of British nationality by naturalization abroad is retained.[2] The inference therefore is that since the Act of 1914, Great Britain will protect her naturalized citizens even in their state of origin. This principle seems to be an unsound one, judged by the experience of both Great Britain and the United States of America,[3] for a state] can hardly claim a right to dictate to another state the conditions on which that state shall give up all claim to the allegiance of its born subjects. It remains to add that a naturalized citizen can denaturalize himself and get rid of his acquired character, just as he got rid of the character given him by birth. If he returns to his fatherland and shows an intention to remain there indefinitely, e.g., by absence for a number of years, he loses his citizenship of naturalization, but does not necessarily regain his citizenship of birth. In order that it may revert to him he may have to comply with formalities required by the law of his native land.[4]

§ 97

Having dealt with natural-born and naturalized subjects, we have now to deal with persons who are not subjects, but are regarded as residing permanently within the state. When such persons not only reside but also intend to remain, they

[1] 33 & 34 Vict. c. 14. [2] [4 & 5 Geo. v, c. 17, sect. 3, 13.]

[3] [Borchard, *Diplomatic Protection of Citizens Abroad*, § 199.]

[4] Moore, *International Law Digest*, vol. III, pp. 744, 754. [Cf. British Nationality and Status of Aliens Act, 1918, sect. 1: see also the amending Act of 1922.]

are called *domiciled aliens*, and various rules have sprung up with regard to them. Since most of these rules deal with matters of private right (e.g., capacity to make a contract or a will), they lie without the province of Public International Law and [fall within that of the Conflict of Laws, or, as it has been most unhappily termed, "Private International Law"]. But in so far as they bear on questions of belligerent capture at sea, and the liability of domiciled aliens to war burdens, both personal and pecuniary, they form part of the rules of warfare, and will be discussed when we come to deal with that portion of our subject.[1]

Domiciled aliens.

§ 98

Aliens, even though they are not domiciled in a state, may come under its laws and jurisdiction to a certain limited extent when within it as *travellers passing through its territory*. Such persons are under its criminal jurisdiction for breaches of the peace and other offences against person and property committed within its dominions; and any contracts they made could be enforced by process directed against their persons, as well as against any property they might possess in the state in question. But their political rights and personal status could be in no way affected by their temporary sojourn within the borders of a foreign land.

Travellers passing through its territory.

§ 99

Things as well as persons are under the jurisdiction of the state within whose territory they are found. The most important of them is *real property*, which may be roughly said to consist of houses and lands, and immovables generally. For all purposes of testamentary and intestate succession, of contracts and of legal proceedings, the law of the country where it is situated, the *lex loci rei sitæ*, applies to it.[2] As to personal property or

Rules relating to various kinds of things within the territory.

[1] See part III, ch. II.

[2] Phillimore, *Commentaries*, vol. IV, ch. xxviii; Bar, *Private International Law*, § 220.

movables, the principles of territoriality, domicile or nationality may be applied. In the vast majority of cases the first two would produce the same result, since a man generally resides where his goods are to be found. But the principle of nationality is generally preferred, except in Great Britain and the United States, where the principle of domicile rules. There is one sort of movable of so important and exceptional a kind, that International Law sets it as it were in a class by itself, and applies special rules to it. We refer to ships. A state's authority over *its own ships, both public and private, in its waters* is absolute. Its jurisdiction extends to their crews also. Those of public vessels, being in the service of the state, are, of course, wholly and entirely under its control; those of merchant vessels come within the territorial jurisdiction, even as regards seamen of foreign nationality. *Foreign merchant vessels within the ports and territorial waters of a state* are subject to the local law and the local jurisdiction. By coming within the waters of a friendly power they put themselves for the time being under the authority of that power. All criminal acts done on board them are justiciable by its tribunals, the ministers of its justice have full power to enter them and make arrests, and the crews are subject to the local law when on board their vessels as well as when on shore. This proposition follows necessarily from the conception of territorial sovereignty, as was clearly seen by Mr. Marcy when, as American secretary of state in 1855, he wrote to Mr. Clay, "As a general rule the jurisdiction of a state is exclusive and absolute within its own territories, of which harbors and territorial waters are as clearly a part as the land."[1] The case of the *Franconia* (*R.* v. *Keyn*)[2] has sometimes been cited as establishing the contrary doctrine; but in reality it did nothing of the kind. The vessel was a German merchantman which, in 1876, ran into and sank the *Strathclyde*, a British ship, within three miles of the shore at Dover. Her master was tried for the manslaughter of a passenger on board the latter vessel, who was drowned in consequence of the collision. But a strong bench of thirteen English judges decided by seven

[1] Moore, *International Law Digest*, vol. II, p. 275.
[2] L. R. 2 Exch. Div. 63.

to six that no British court had jurisdiction over a crime committed by foreigners on board a foreign ship when it was passing within three miles of a British coast. The ground of this decision was that such jurisdiction had never been claimed by any English king, and was not conferred by any English law. And it was further ruled that it could not be exercised unless it had been so conferred. It was not seriously disputed that by International Law any state that chose could, without offence to other states, assume jurisdiction within three marine miles of its coast line. And, indeed, when Parliament, in 1878, passed an act called the Territorial Waters Jurisdiction Act, declaring that the rightful jurisdiction of the British Crown extended to the marine league, no protest was made by any foreign power.[1] France, however, draws a distinction between two classes of acts done on board a foreign merchant ship in one of her ports. If the act concerns members of the crew only and does not take effect outside the vessel, she exercises no jurisdiction over it. If it concerns members of the crew and other individuals, or takes effect outside the vessel to the danger of the peace or health of the port, she will take cognizance of it. It is sometimes claimed that this rule is International Law; but it is not based upon general or long-continued usage, nor is it a logical deduction from any universally admitted principle. On the contrary, it restricts in some measure the application of the fundamental principle of territorial sovereignty. Yet it has many recommendations. It limits the sphere of local authority to the necessities of local security, and leaves the interior discipline and economy of the vessel to be regulated by the laws of its own country, thus giving effect to the jurisdiction of each state in the sphere which seems naturally and properly to belong to it. The French rule or a modification of it has been received with much favor in recent times. Some states have refused to exercise authority over foreign merchantmen in their ports in cases where nothing beyond the internal economy of the vessel was concerned, and many treaties have been negotiated in which the contracting parties bind themselves not to interfere on board one another's

[1] Stephen, *History of the Criminal Law of England*, vol. II, pp. 29–32.

vessels in their ports, unless the peace or safety of the neighborhood is threatened or some person other than a member of the crew is concerned. Thus, for instance, in 1866 the United States refused to compel the seamen on board a British merchant ship in American territorial waters to perform their duties as mariners,[1] and in 1870 they entered into a Consular Convention with Austria, followed the next year by one with the German Empire, in each of which was embodied the rule above described, with the further proviso that "consuls, vice-consuls, or consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation."[2] There is no difficulty in carrying out these provisions; nor does a state leave the door open to confusion and anarchy by refusing to exercise jurisdiction in certain cases over foreign merchant vessels in her ports. The principle of territorial sovereignty and territorial jurisdiction overrides that of the authority of a state over its merchantmen, when the two conflict. But if the former is not enforced the latter at once revives, and the vessels and crews come under the laws of their own country to the exact extent of their exemption from the laws of the country in whose waters they are staying. It is quite possible that French practice may in time become a rule of International Law. At present its application has to be secured by special treaty stipulations.

## § 100

A state has jurisdiction over all its ships on the high seas.

The second of our fundamental rules on the subject of jurisdiction is that A STATE HAS JURISDICTION OVER ALL ITS SHIPS ON THE HIGH SEAS. For no purpose can the complete jurisdiction of a state over its *public vessels on the high seas* be overridden or qualified by any exercise of authority on the part of another state. Even the right of search does not apply to them; and while the merchant vessels of neutrals must submit to be overhauled by the cruisers of both belligerents, their men-of-war are as free from molestation as they would be in time of profound peace. So

[1] Wharton, *International Law of the United States*, § 35.

[2] *Treaties of the United States*, pp. 34, 366, 367.

absolute are the rights of a state over its public ships that some writers have sought to account for them by the statement that such vessels are floating portions of the territory of the state to which they belong.[1] Obviously this is a fiction; but under the name of the principle of exterritoriality it has been made the basis of much elaborate reasoning, and has been very influential in the development of theories of immunity from territorial jurisdiction. We shall meet it again in connection with other subjects. Here it is sufficient to say that the position accorded by International Law to public vessels rests upon considerations of convenience and utility and receives ample support from the practice of civilized states. There is no need to invent a fiction in order to account for it, when we remember that a public vessel is in the service of the government of the country to which she belongs, and that to allow any other authority to detain her upon the high seas would be to derogate from its sovereignty and interfere with the due performance of its orders. Moreover the fiction is mischievous as well as unnecessary. It proves a great deal too much; for if a ship-of-war were really a portion of the territory of the state that owns her, the health laws and port regulations of any other state could under no circumstances be applied to her, whereas we shall see, when we come to consider the immunities of public vessels in foreign ports,[2] that local regulations about such matters must be obeyed.

With regard to *merchant vessels on the high seas*, International Law lays down that each state exercises jurisdiction over its own, and possesses no authority over those of other nations, except that in time of war its cruisers may search neutral ships and capture any whose proceedings justify seizure. Jurisdiction over the vessels involves jurisdiction over all persons and things on board, including foreigners, whether seamen or passengers. And this power carries with it a corresponding responsibility. A state is bound to give redress in its courts for wrongful acts done on board its merchant vessels on the high seas against foreigners, and is responsible for the acts of any

[1] *E.g.* Hautefeuille, *Droits des Nations Neutres*, vol. I, pp. 289 *seq.*

[2] See § 107.

such ship if it does what is illegal by International Law, except in the case of piracy which is justiciable by every state, and of those offences against neutrality which belligerents are permitted to deal with themselves.

The question of a state's exclusive jurisdiction over its merchant vessels was involved in the quarrel between Great Britain and the United States at the beginning of the nineteenth century. It arose out of the claim of the former to take British seamen from American vessels on the high seas and impress them for the royal navy, as an incident of the belligerent right of searching neutral ships. The matter was complicated by a dispute concerning the doctrine of inalienable allegiance; for some of the seamen forcibly taken were naturalized American citizens, whom the British Government regarded as still possessed of their original nationality.[1] The main point at issue, however, was whether one state had a right to execute its laws within the merchantmen of another engaged in navigating the open ocean. To this all other questions were subsidiary. Side issues arose, such as the pressing need of Great Britain for seamen, her right to call upon all her subjects for aid in the great struggle with Napoleon, the provocative conduct of some American skippers who hovered outside British ports and made their vessels places of refuge for British deserters, the extent of the right of search, and the theory of the indelible character of citizenship; but the kernel of the controversy was the question of jurisdiction. There can be no doubt that Great Britain was wrong. Her claim was in direct conflict with admitted principle.[2] It led to the War of 1812 between the two kindred nations; but the Treaty of Ghent, which closed the struggle in 1814, was silent as to the matter in dispute. After the great European peace of 1815 Great Britain gave up the practice of impressing seamen for her navy, and thus incidentally removed all chance of a renewal of the conflict. In 1842 Mr. Webster declared in his correspondence with Lord Ashburton that the United States would not in future allow seamen to be impressed from American vessels. The claim of right has never been formally

[1] See § 96.

[2] Phillimore, *Commentaries*, vol. I, sect. cccxx.

abandoned by the British Government; but modern English writers regard it as indefensible, and it is not likely to be revived.[1]

§ 101

Our third fundamental rule is that A STATE HAS LIMITED JURISDICTION OVER ITS SUBJECTS ABROAD. This jurisdiction is personal, and cannot as a rule be enforced unless the subjects in question come within the territorial or maritime jurisdiction of the state to which they belong. In virtue of the tie of allegiance a subject of a state that makes military service obligatory is bound to return from abroad in order to perform it, especially if his fatherland is at war.[2] Again, all civilized powers regard as punishable at home grave political offences against themselves committed by their subjects while resident abroad; and sometimes the more heinous crimes are looked upon in the same way, if they have not been already dealt with by the state in whose territory they took place, and if the criminals are not subject to extradition. Crimes committed by subjects on board foreign vessels are placed in the same category with crimes committed on foreign territory.[3] The jurisdiction claimed in these cases is a mixture of the personal and the territorial. It is personal in that the authority to take notice of the act and regard it as a crime is derived from the personal tie of allegiance subsisting between the doer and the state. It is territorial in that no arrest can be made or punishment inflicted until the offender has come within the state's territory or on board one of its vessels, unless indeed he has property within the jurisdiction, in which case it can be confiscated or made to satisfy pecuniary claims. Instances of purely personal jurisdiction are to be found when a state authorizes the establishment of a magistracy in barbarous districts bordering on its possessions but neither owned nor protected by any civilized power. Great Britain has done this by a series of statutes,

A state has jurisdiction over its subjects abroad.

[1] Moore, *International Law Digest*, vol. II, pp. 987–1001; Wheaton, *History of the Law of Nations*, part IV, § 34.

[2] Despagnet, *Droit International Public*, § 331.

[3] Westlake, *International Law*, part I, p. 208.

beginning with the Foreign Jurisdiction Act of 1843 and ending with the Foreign Jurisdiction Act of 1890.[1] Magistrates appointed under the provisions of Orders in Council issued in accordance with these acts have a personal jurisdiction over subjects of the state who may be in the district assigned to them, but they can have no jurisdiction over others except by consent, seeing that they can claim no territorial authority. They are simply sent out into the wilderness to see that their fellow-citizens behave with a reasonable amount of propriety. Their authority is an emanation from the personal jurisdiction of the state over all its subjects wherever they may be; and it is capable of exercise in places outside the dominions or colonial protectorates of any civilized power, because no territorial jurisdiction exists there to override it. A good example of the assumption of such authority is to be found in the British Order in Council of March 15, 1893, whereby Great Britain set up courts having jurisdiction over her subjects in places and islands in the Pacific, "which are for the time being under no civilized government." But foreigners were not to come under the jurisdiction thus assumed in civil proceedings unless they filed in court their own consent and, if required, a certificate of consent in writing obtained from the competent authorities of their own nation.[2]

## § 102

A state has jurisdiction over all pirates seized by its vessels.

We now come to the fourth and last of our fundamental rules. It is that A STATE HAS JURISDICTION OVER ALL PIRATES SEIZED BY ITS VESSELS. Piracy is an offence against the whole body of civilized states, not against any particular one of them. It is a crime by International Law which describes its nature and provides that the death penalty may be inflicted upon those who are guilty of it. The best definition of it is "any armed violence at sea which is not a lawful act of war."[3] It is invariably connected with the sea, which is under no terri-

[1] Nys, *Droit International*, vol. II, pp. 262, 263.
[2] Hertslet, *Treaties*, vol. XIV, 871–909.
[3] Kenny, *Outlines of Criminal Law*, p. 316.

torial jurisdiction, and it is justiciable by any state whose cruisers can capture those who are guilty of it. An act to be piratical must be *an act of violence adequate in degree;* but it need not necessarily be an act of depredation. Generally a pirate is merely a robber of the vulgarest and cruelest kind; but there have been cases in which acts done by unauthorized persons for political ends have been regarded as piratical, though the *animus furandi* was wanting and there was no thought of indiscriminate aggression upon vessels of all nations. A single act of violence will suffice, such, for instance, as the successful revolt of the crew of a vessel against their officers. If they take the ship out of the hands of the lawful authorities, they become pirates, though if their attempt fails and lawful authority is never superseded on board, they are guilty of mutiny and not piracy. Another mark of a piratical act is that it must be *an act done outside the territorial jurisdiction of any civilized state.* Piracy must always be connected with the sea, but it may be committed by descent from the sea as well as actually upon it. Landing on an unappropriated island and robbing civilized people who had been cast ashore there, or were engaged in trade or missionary work among the natives, would be piracy if done by the crew of an unauthorized sea rover.[1] Hall seems to hold that a descent from the sea on the coast of a civilized state to rob and destroy without any national authorization would be accounted a piratical act;[2] but surely the fact that the crime was committed within territorial jurisdiction would make the perpetrators amenable to the law of the state, not to the provisions of the international code. If the state were so weak, or its agents so remote, that the authors of the outrage were likely to escape unharmed, their seizure by the forces of another state which happened to be on or near the spot would be an act of comity, and therefore deserving of gratitude and thanks, though a legal question might arise as to whether they should be tried and punished by the captors' authorities or by those of the state within which the unlawful acts were done. In any case the original act which

[1] [Cf. Oppenheim, *International Law*, vol. 1, § 277.]

[2] *International Law*, 7th ed., § 81.

made the vessel into a pirate must have been committed on the high seas. If it were done within the territory or territorial waters of any power, it would come under the exclusive jurisdiction of that power, and could not be what piracy is, an offence against the whole body of civilized states. The last mark of a piratical act is that it must be *an act the perpetrators of which are destitute of authorization from any recognized political community.* Acts which when done under national authorization are lawful hostilities, are piracy when done without such authorization; and the presence of two or more incompatible authorizations is deemed to have the same effect as the absence of any. Thus if in time of war a vessel obtains a commission from each belligerent and depredates impartially upon the commerce of both, she is a pirate. But a cruiser which, having a lawful commission, or being deemed by her government to have one, makes captures not authorized by the laws of war, is no pirate; for she has not thrown off national authority, and the state that owns her is responsible for her misdeeds. Thus when in 1904 the Russian cruiser *Peterburg* made prize of the British steamer *Malacca* in the Red Sea, Great Britain demanded and obtained from Russia the release of the captured vessel. But she made no attack on the captor, though she held that, having passed the Dardanelles and the Bosphorus as a merchantman, it was not entitled to make seizures as a ship-of-war in the Red Sea or elsewhere.[1] A commission from a community which has received recognition of belligerency but not recognition of independence is sufficient authorization for such acts of violence as are allowed to belligerent cruisers. But if the community fails in its struggle and ceases to exist as a separate political unit, its commissions are no longer valid, and acts done under cover of them become piratical because they are unauthorized. These points were well illustrated by the career of the Confederate cruiser *Shenandoah* at the close of the great American civil war. She was in the Antarctic seas when Richmond fell and the Confederacy came to an end in the spring of 1865. Through the summer she continued to

[1] Lawrence, *War and Neutrality in the Far East*, 2d ed., pp. 205–209, 213–215.

make depredations on American vessels around Cape Horn. But when her captain gave up his ship to the port authorities at Liverpool in November, he asserted that he was ignorant of the extinction of his government till August 2, and that as soon as he obtained the news he desisted from further hostilities. The British Government believed his story and allowed him and his crew to go free, while the vessel was given up to the United States.[1] There was some doubt at the time with regard to the facts, but none as to the law. Had it been clear that captures were made with full knowledge of the downfall of the Confederacy, the *Shenandoah* would certainly have been a pirate.

It has been argued that even though a revolted political community has not obtained recognition of belligerency, its commissions must be held to protect those who act under them at sea from the charge of being pirates.[2] But the case of the *Huascar* seems to point to the opposite conclusion. In 1877 this vessel, whose after career was to be so checkered and glorious, revolted from the government of Peru, and while on a short voyage stopped two British vessels on the high seas and took coals from one and Peruvian officials from the other. There was no political organization at her back, no provisional government to give her a commission; no territory was in insurrection; no other ship even took up her cause. She was solitary in her movement; and the Peruvian Government disclaimed responsibility for her acts. Under such circumstances recognition of belligerency was out of the question, and the *Huascar* could only be regarded as an unauthorized rover of the seas. The English admiral on the Pacific station declared that she was a pirate, at least as far as British subjects and property were concerned. He endeavored to capture her, but failed; and the vessel surrendered to a Peruvian squadron. The British Government approved the conduct of Admiral de Horsey in the face of a remonstrance from Peru and a debate raised by the opposition in the House of Commons.[3] But it would

[1] British Parliamentary papers, *British Case presented to the Geneva Arbitrators*, pp. 156–160. [2] Hall, *International Law*, 7th ed., § 81.

[3] British Parliamentary Papers, *Peru*, No. 1 (1887); *Hansard*, 3d Series, vol. CCXXXVI, pp. 787–802.

have been possible for him to have justified his proceedings against the *Huascar* without raising the question of piracy. Such a vessel might be prevented by force from interference with the trade of third parties, and yet be free from attack as long as she did not molest them, whereas an ordinary pirate would be attacked by any cruiser who felt herself strong enough to make the capture. Thus in 1893, when the greater part of the Brazilian fleet rebelled under Admiral de Mello, and kept up in the inner harbor of Rio de Janeiro an artillery duel with the forts and batteries which remained faithful to the government, the commanders of the British, American, French, Italian, and Portuguese naval forces on the spot informed its chief that they would not suffer him to perform acts of war against the trade of their compatriots, or endanger the lives and property of their countrymen by firing on the commercial and residential quarters of the city. As long as these conditions were observed they left him free to conduct his operations as he pleased; but, when some time afterwards an American boat was fired on by an insurgent vessel, the American commander, Admiral Benham, returned the fire from the *Detroit*. This case, and others of a similar kind, point to the existence of a condition midway between belligerency and piracy, which it would be advisable to recognize under the name of *insurgency*.[1]

§ 103

Distinction between piracy by the law of nations and piracy by municipal law. The slave trade.

We must now distinguish between piracy *jure gentium* which has just been described, and offences which are designated as piracy by municipal law and by municipal law only. Each state by virtue of its independence can regulate its criminal code in the way that seems best to it; and if it chooses in the exercise of its discretion to regard as piracy certain offences which are not so regarded by International Law, it is acting within its rights. Such laws bind the tribunals of the state that makes them and have coercive force within its jurisdiction, but no

[1] See § 142. G. G. Wilson, *Insurgency;* Lawrence, *Recognition of Belligerency*, in *Journal of Royal United Service Institution*, January, 1897. Hall, *International Law*, 7th ed., § 5*a*.

further. Even if the laws of other countries contain similar provisions, each law can take effect only within the sphere of the authority that sets it. Without special agreement among states, none can arrest or punish subjects of the others for offences committed outside its own jurisdiction, even though they are regarded as offences by the law of the state to which the offender belongs. This is so clear that no attempt has been made to assume a kind of international jurisdiction over acts declared to be piracy by municipal law, except in the one case of the slave trade. In her zeal for its suppression Great Britain, during the first half of the nineteenth century, instructed her cruisers to stop and search vessels of all nations suspected of being engaged in it. But her claim to have the right to do so was vigorously challenged, especially by the United States; and in 1858 it was abandoned on the advice of the law officers of the Crown.[1] There can be no doubt that, agreement apart, no right of search exists in time of peace even for such an excellent purpose as the suppression of the slave trade. The most far-reaching of the agreements in this direction is the great International Convention of 1890, which was the Final Act of a Conference of representatives of all civilized powers called by Belgium at the suggestion of Great Britain.[2] By the middle of 1892 the Convention had received the formal assent of the civilized world.[3]

It stipulates for measures of repression, to be carried out by each of the signatory powers, in the A rican territory over which it possesses either sovereignty or a protectorate. Stations and fortified ports are to be established from time to time as the country is opened up, and armed cruisers are to be placed on in'and lakes and navigable waters The importation and sale of firearms and ammunition is to be put under stringent restrictions in a zone extending over the greater part of the continent and including the islands within a hundred miles of the coast. Within this zone the traffic in intoxicating

[1] Moore, *International Law Digest*, vol. II, pp. 914–945.

[2] British Parliamentary Papers, *Africa*, No. 7 (1890).

[3] *Ibid.*, *Treaty Series*, No. 7 (1892); Moore, *International Law Digest*, vol. II, pp. 948–951.

liquors is to be prohibited or severely restricted. Such of the signatory powers as allow domestic slavery are to prohibit the importation into their territories of African slaves. A great international information office is to be established at Zanzibar, with branches at other African ports: and in it are to be concentrated documents of all kinds with regard to the progress of the work of exterminating the slave trade under the Convention, while by means of it a constant interchange of information is to take place between the powers concerned. With regard to measures of repression connected with the sea, a great maritime zone is created, covering the western part of the Indian Ocean from Madagascar to the coasts of Beloochistan. Within this zone a very limited right of search is granted to one another by the signatory powers. Vessels suspected of being engaged in the traffic are to be handed over to a court of their own country for trial; and in case of condemnation the slaves are to be set at liberty and the captain and crew punished according to their offence. Native vessels are not to receive authorizations to carry the flag of one of the contracting parties for more than a year at a time, and their owners must be subjects of the power whose flag they apply to carry, and enjoy a good character, especially as regards the slave trade. The authorization is to be forfeited at once if acts or attempted acts of slave trading are brought home to the captain or owner. Lists of the crew and of negro passengers are to be delivered at the port of departure by the captain of the vessel to the authority of the power whose flag it carries, and the authority is to question both seamen and passengers as to the voluntary nature of their engagement. These lists are to be checked at the port of destination and at all ports of call. Certified copies of all authorizations and notices of the withdrawal of authorizations are to be sent to the international information office at Zanzibar. Slaves detained on board a native vessel against their will can claim their liberty, and any slave taking refuge on board a vessel bearing the flag of one of the signatory powers is to be set free.[1]

[1] *Supplement to the American Journal of International Law*, vol. III, pp. 29–59; British Parliamentary Papers, *Treaty Series*, No. 7 (1892).

[By a Convention between the United States of America, Belgium, the British Empire, France, Italy, Japan, and Portugal, signed in September 1919 (see § 52), the Final Act of 1890 was abrogated as between these powers, who, however, stipulate that they will endeavor to secure the complete suppression of slavery in all its forms and of the slave trade by land and sea.[1] This Convention is made binding on Germany, Austria, and Bulgaria by the treaties of peace made with them respectively; and on Turkey by Art. 415 of the still unratified Treaty of Sèvres].

## § 104

The claims to jurisdiction over foreigners for offences committed abroad.

We have now gone through the general and admitted rules as to a state's jurisdiction, with the exception of those which concern the powers exercised by belligerents over neutral individuals to restrain and punish violations of the rules laid down by the law of neutrality. These will be best discussed when we come to that portion of our subject. But before we deal with the exceptions to ordinary jurisdictional rights, we must consider a class of cases in which jurisdiction is sometimes assumed by states, though it is, to say the least, very doubtful whether they are justified in doing so. There are provisions in the laws of many countries whereby certain crimes committed by foreigners within foreign jurisdiction are made justiciable in their courts. Thus France, Germany, and Austria punish foreigners who have committed abroad crimes against the safety of the French, German, or Austrian state; and some powers, such as Russia and Italy, go further and punish offences against their individual subjects, such as murder, arson, and forgery, though committed in a foreign country by persons of foreign nationality.[2] Of course the offenders cannot be tried and punished unless they come within the territory of the aggrieved state. But we may

[1] [Art. 11, 13. *State Papers, Treaty Series*, 1919. No. 18. Cmd. 477.]

[2] For the law of most civilized nations on this subject, see the Report of the American Department of State on *Extraterritorial Crime and the Cutting Case*, pp. 38–53.

well share the doubts of Wheaton,[1] Hall,[2] Westlake,[3] Oppenheim[4] and other authorities as to the existence of any right of jurisdiction in such cases. A state has authority over foreigners within its territory, not over foreigners abroad. An attempt to punish an alien within the territory for an offence committed before he came to it is an attempt to exercise jurisdiction over acts done in another state, and is thus contrary to the very principle of territorial jurisdiction on which it is nominally based. In similar cases a state can punish its own citizens; but its right to do so is based upon the personal claim it has to their allegiance wherever they may be. There is no personal tie in the case of aliens; and it may justly be contended that any attempt to exercise over them such jurisdiction as we are considering would give good ground for remonstrance from the state of which they were subjects. If the offences in question are grave crimes, the perpetrators may be surrendered by extradition to the authorities of the country where the wrong was done. If they are small matters, there is no need to notice them. It is true that most states refuse to extradite political offenders; but diplomatic complaint will usually secure the exercise on the part of a government of watchfulness to prevent its soil being made the scene of conspiracies against the political institutions of other countries. In any case an occasional failure of justice is preferable to putting the subjects of every state at the mercy of the law and administration of its neighbors. This view has been pressed and acted upon in several modern cases, notably in the controversy between the United States and Mexico with regard to Mr. Cutting, who was arrested and imprisoned in Mexico in 1886 for an alleged offence committed in Texas against a Mexican citizen. The Government of Washington demanded his release, which was granted after some delay. From the vigorous action taken by the American authorities on this occasion, it is evident that the United States is deeply committed to the

[1] *International Law*, § 113. [2] *Ibid.*, 7th ed., § 62.

[3] *Ibid.*, part 1, pp. 251–253; *Annuaire de l'Institut de Droit International*, 1880, pp. 50 *et seq.*

[4] *International Law*, vol. 1, § 147.

view we have ventured to enunciate.[1] Great Britain takes the same position; but on the other hand the Institute of International Law voted in 1883 in favor of a right of jurisdiction over foreigners in respect of acts done outside the territory, subject, however, to the two conditions that the acts in question compromise the security and social order of the state that punishes them, and are not liable to punishment by the law of the country where they took place.[2] These limitations attenuate the so-called right considerably, but do not remove the objections to it on the score of principle.

## § 105

It will be remembered that, when we claimed for a state jurisdiction over all persons and all things within its territory, we stated that there were a few exceptions. We will now proceed to enumerate them. First among those who in a foreign country are not subject to ordinary rules come

*Foreign sovereigns and their suites.*

When the head of a state is visiting a foreign country or travelling through it in his official capacity, not only must all the usual ceremonial honors be rendered to him, but he and his effects are exempt entirely from the local jurisdiction. He cannot be proceeded against civilly or criminally and his immunities in this respect are shared by his attendants. If he conspires against the state, or permits his suite to do any acts against its safety, or harbors criminals and refugees in the residence assigned to him, he may be requested to leave the territory or in the last resort, may be sent out of it, but he cannot be tried and punished within it. He may not, however, exercise any jurisdiction of his own within the state he is visiting, though he may carry on his ordinary administrative work with regard to home affairs. If any serious and urgent cases arise among his retinue, they must be sent home for trial.

Exceptions to ordinary rules about jurisdiction: (1) Foreign sovereigns and their suites.

[1] Hall, *International Law*, 7th ed., § 62. Moore, *International Law Digest*, vol. II, pp. 232–242.

[2] *Tableau Général de l'Institut de Droit International*, p. 100.

All immunities vanish, should a sovereign travel *incognito* as a private person; but he can at any time regain them by appearing in his official character. If the same person should be both ruler and ruled, as the late Duke of Albany was sovereign in Saxe-Coburg-Gotha and subject in England, he would not be allowed to escape from any obligations that might accrue to him while resident in the country in which he was subject by pleading that he was sovereign in another country. Writers have differed as to whether the president of a republic is entitled when abroad to the same honors and immunities as a monarch; but the modern visits of presidents of the French Republic to Russia, [England, and Italy, and that of the President of the United States of America to England seem to have settled the question in the affirmative].[1]

§ 106

Next in our list of those who are free from local jurisdiction come

*Diplomatic agents of foreign states.*

Exceptions to ordinary rules about jurisdiction: (2) Diplomatic agents of foreign states.

When an accredited representative of a foreign power is residing in the country to which he is sent, or travelling through it or any other friendly country on his way to or from his post, he and his effects are in the main free from the local jurisdiction. The members of his official suite have similar immunities; and the inviolability attached to the person of the ambassador is held to extend itself to his wife and children, and to those members of his household who, though not possessed of the diplomatic character, are necessary for his convenience and comfort. We shall discuss the question of diplomatic immunity at some length when we come to deal with the subject of Legation and Negotiation;[2] but we allude to it here in order to show that the privileges accorded to ambassadors are exceptions to the ordinary rules concerning state authority.

[1] Despagnet, *Droit International Public*, § 254.

[2] See §§ 128–130.

§ 107

Among those whose privileged position entitles them to exemption from the jurisdiction of a friendly power when they come within its territory, we must give a prominent place to

*The public armed forces of foreign states.*

We will first consider the case of land forces and then discuss the extent of the immunities of sea forces. It is necessary to separate the two because the rules with regard to them differ. The universally recognized rule of modern times is that a state must obtain express permission before its troops can pass through the territory of another state, though the contrary opinion was held strongly by Grotius,[1] and his views continued to influence publicists till quite recently. Permission may be given as a permanent privilege by treaty for such a purpose as sending relief to garrisons, or it may be granted as a special favor for the special occasion on which it is asked. The agreement for passage generally contains provisions for the maintenance of order in the force by its own officers, and makes them, and the state in whose service they are, responsible for the good behavior of the soldiers towards the inhabitants. In the absence of special agreement the troops would not be amenable to the local law, but would be under the jurisdiction and control of their own commanders, as long as they remained within their own lines or were away on duty, but not otherwise.

Exceptions to ordinary rules about jurisdiction: (3) Public armed forces of foreign states.

With regard to public vessels, which though generally men-of-war may be unarmed ships in the service of the state, no special permission is required before they can enter the ports of a friendly state. Freedom of entry is assumed unless the local sovereign makes an express declaration to the contrary, which he can do on assigning good reasons. But in case of war he must, if neutral, treat both belligerents alike, and not admit the vessels of one while excluding those of the other. He must also enforce conditions which protect his sovereignty and make his neutrality real.[2] Exclusion is very rare; and the tacit per-

[1] *De Jure Belli ac Pacis*, bk. II, ch. II, xiii.

[2] See part IV, ch. iii.

mission to enter implied by the absence of any attempt to prevent entry is freely accorded. Moreover, it is now held to carry with it a more or less complete exemption from the authority of the local sovereign. The accepted principle of modern times is that jurisdiction is waived when entry is allowed. But it must be admitted that this broad doctrine is of recent growth. In 1794 Attorney-General Bradford gave an opinion in the case of a British sloop-of-war, out of which six American citizens were taken by the local authorities while she was lying in the harbor of Newport, Rhode Island. On the case being referred to him by the Government of Washington, he replied that "the laws of nations invest the commander of a foreign ship-of-war with no exemption from the jurisdiction of the country into which he comes."[1] A similar opinion was given in 1799 by Attorney-General Lee in the case of the British packet *Chesterfield*, as to which he declared, "It is lawful to serve civil or criminal process upon a person on board a British ship-of-war lying in the harbor of New York,"[2] and argued that due respect to the country visited involved obedience to such process. These views were by no means confined to American lawyers. They seem to have been held by authorities of the highest repute in England. Thus in 1820 Lord Stowell was asked by the British Government for an opinion upon the case of John Brown, a British subject who, having escaped from a prison into which he had been thrown by the Spaniards for aiding their revolted American colonies, took refuge on the British warship *Tyne*, lying in the harbor of Callao, and claimed the protection of the flag. In his reply the great English jurist not only declared that the captain of the British vessel had no right to protect Brown, but added, "I am led to think that the Spaniards would not have been chargeable with illegal violence, if they had thought proper to employ force in taking this person out of the vessel."[3]

Such doctrines as these would reduce the immunities of a public vessel almost to vanishing point. They would never

[1] *Opinions of Attorneys-General of the United States*, vol. I, p. 47.
[2] *Ibid.*, p. 91.
[3] Halleck, *International Law* (Baker's ed.), vol. I, p. 230.

probably have been acquiesced in on the continent of Europe, and even while they were being uttered in England and America a strong countercurrent of opinion made itself manifest in quarters entitled to the utmost respect. Thus in 1810 Chief Justice Marshall, in delivering the judgment of the Supreme Court of the United States in the famous case of the *Exchange*,[1] took occasion to discuss the whole subject of the exemption of public ships in foreign ports from the local jurisdiction. He placed permission to enter upon the ground of implied license, and, after pointing out that a ship-of-war could not do her duty to her sovereign if she were subject to the interference of another authority, he went on to say, "The implied license, therefore, under which such a vessel enters a friendly port may reasonably be construed, and it seems to the court ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rites of hospitality." On this great judgment the doctrine now most widely held both in America and in Great Britain is based. In 1855 during the Crimean War the British cruiser *President* captured a Russian vessel called the *Sitka* and brought her into the harbor of San Francisco with a prize-crew on board. The local courts issued a writ of *habeas corpus* to try the validity of the detention of two of the prisoners. Process was served, but the commander of the *Sitka* immediately departed without obeying it. The opinion of Attorney-General Cushing was taken upon the case. He commended the captain for departing and thus avoiding unprofitable controversy, and took occasion to say that the courts of the United States had "adopted unequivocally the doctrine that a public ship-of-war of a foreign sovereign at peace with the United States, coming into our ports and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country."[2] This view is shared by British and American writers of repute and by almost all the international jurists of continental Europe. Indeed it may be said to have been adopted by the publicists of the civilized world. Ortolan, the only one among them who by reason of his

[1] Cranch, *Reports of the U. S. Supreme Court*, vol. VII, p. 116.

[2] *Opinions of Attorneys-General of the United States*, vol. VII, p. 122.

career as a naval officer is able to speak from practical experience, is most emphatic in his assertion of immunity.[1] This consensus of opinion outweighs entirely the views of a few great English lawyers and one or two continental jurists who still cling to the ancient doctrine; and recent practice is in entire accord with it. Ships-of-war everywhere claim and everywhere receive exemption from the local jurisdiction. If International Law is to be deduced from practice, the controversy on this point is at an end.

But though exemption is the general rule, we shall find on an examination of the usages of states that it is not absolute and complete. Being based upon convenience it is limited by convenience; and extreme inconvenience would obviously result if ships-of-war in foreign ports were at liberty to disregard ordinary harbor regulations and sanitary precautions. The local authorities can enforce all reasonable health and port regulations; and, if the visiting vessel is a belligerent, they may compel it to observe neutrality regulations, and may detain and try any prizes it has brought into the port, should there be good reason to believe that the captures were made in violation of their neutrality. It is further clear that a state may prevent the cruisers of another state from enforcing their revenue laws in its waters. These exceptions to the ordinary rule are amply sufficient to demonstrate the falsity of the theory that a ship-of-war is for all legal purposes a floating portion of the territory of the state to which she belongs. If she were anything of the kind, she could in no way be made amenable to the local jurisdiction.

## § 108

The case of political offenders and fugitive slaves.

The immunities granted to public vessels while lying in the territorial waters of friendly states ought not to be abused. A ship-of-war is a floating fortress charged with the duty of protecting the interests of her country wherever she may be sent. To turn her into an asylum for fugitive criminals is a gross perversion of the purpose for which she was commissioned by her own sovereign,

[1] *Diplomatie de la Mer*, bk. II, ch. X.

as well as a gross insult to the sovereign in whose waters she is staying. Any captain proved to be guilty of it ought to be dismissed from the service without ceremony. Even when a criminal has succeeded in taking refuge on board without the connivance of the commander, he should, if possible, be given up unless his offence be political. But the demand should be made diplomatically, not to the captain, who has no authority to hold an extradition court on board his vessel and decide whether the alleged offender should be surrendered or not. Still less should any attempt be made by the local authorities to arrest the fugitive on board the foreign vessel of war. They have no power to enforce their law under its flag, and a commander who in such a case repelled force by force would be acting within his duty. The best course for the officer in command to take when a fugitive criminal is found on board is to expel him at once. He can be turned out of the vessel into which he entered without right, though the captain cannot suffer him to be arrested while on board or entertain any demand for his surrender; and when he has been set on shore, the local authorities can deal with him. They can be warned beforehand that he will be landed at a given time and place. But political offenders are held to differ from ordinary criminals, and the great preponderance of modern opinion and practice is in favor of their reception. Yet even in their case the commanders of public vessels are bound to refrain from offering asylum and aiding escape. If a political refugee in imminent danger is able to reach a foreign man-of-war lying in the waters of the country whose authorities are seeking to secure him, he may be allowed to come on board, and must be protected against arrest. This is the rule of Great Britain and America, and most civilized states concur in it. It applies also to the case of a political offender who escapes to some other country, and, having come on board in its waters, is taken by the vessel into a port of the country in which his offence was committed. In no case should any demand for the surrender of the refugee be entertained by the commanding officer of the ship that has received him. The authorities who wish to secure him must ask for his extradition through the usual diplomatic channels.

A British commander left without instructions should bring the fugitive to an English port, or set him ashore in some country where he will be safe. While on board he must not be allowed to communicate with his political friends or use the ship in any way for propagandist purposes. But it should be noted that merchant vessels can offer no asylum to offenders of any kind. However unjust the local law may be, however tyrannical the government, however laudable resistance to its authority, no safe place of refuge can be found on board a foreign merchantman in its ports. The local law applies to such ships; they are under the local jurisdiction; and the local authorities may enter them and arrest any of their own subjects found therein. But in the early years of the last decade of the nineteenth century, the United States showed a disposition to assert a qualified right of asylum on board their merchant vessels, more especially if they were mail steamers. In the case of General Barrundia, which occurred in 1890, a diplomatic minister was recalled for writing a letter in which he advised the captain of an American passenger steamer to deliver up the general, a Guatemalan political refugee, to the local authorities in the Guatemalan port of San José. And in connection with the same case a commander of the United States navy was censured for failing to offer Barrundia an asylum on board his vessel.[1] But the new and somewhat nebulous doctrine involved in this and other cases which arose about the same time has not been mentioned since; and in 1896 Mr. Olney, as secretary of state, informed the Turkish Minister that "if any attempt were made [at Constantinople] to land clandestinely men or munitions from a vessel under our [American] flag, the officers of the United States would certainly interpose no obstacle to the due execution of the laws of Turkey by Turkish agents, or intervene further than to secure for any implicated citizen of the United States all rights and privileges to which he may be entitled in virtue of such citizenship."[2]

The case of fugitive slaves has raised a considerable amount of difficulty, especially in Great Britain. There can be no

[1] Moore, *International Law Digest*, vol. II, pp. 851, 852, 871–883.
[2] *Ibid.*, vol. II, p. 279.

doubt that during the prevalence of that older view of the law which reduced to very small proportions the immunities of public vessels in foreign waters, slaves who escaped to British vessels lying in the ports of countries where slavery was legal were given up to the local authorities.[1] But the growth of opinion in favor of the modern doctrine of exemption except for a few well-defined purposes coincided with the deepening of the feeling against slavery; and a great outcry arose in England when in 1875 the British Admiralty issued a circular directing captains of the Queen's ships to surrender fugitive slaves who came on board their vessels in the territorial waters of states that authorize slavery. The Government appointed a commission to investigate the subject; and, after receiving its report, withdrew the first circular and published a second, which directed naval officers in the circumstances just described not to receive a slave on board unless his life was in manifest danger, and not to keep him on board after the danger was passed, but to entertain no demand for his surrender nor enter into any examination as to his status.[2] This placed the larger part of the burden of responsibility on the captains who had to deal with the cases; but it made clear the adhesion of Great Britain to the doctrine of the immunity of the public vessel from local authority, which had been strenuously maintained by the international lawyers who were members of the commission and as strenuously denied by their colleagues.

Though a state is forbidden to execute its laws on board foreign men-of-war lying in its harbors, it is not left without remedies if it deems itself aggrieved by the proceedings of such vessels. It can demand the extradition of the fugitives, it can complain diplomatically, it can order the offending vessel to quit its waters, and it can refuse to receive into its ports in future any public vessels of the same nationality. Moreover, the immunities of which we have been speaking do not follow the members of the ship's company when they land for their own purposes and not on public business. In their ship, and in its boats, which are appurtenant to it and share its privileges,

[1] *Report of the British Fugitive Slave Commission*, 1875.

[2] *British Fugiivet Slave Circular, Dec. 5, 1875*, § 93 *C.*

they are exempt from the local jurisdiction; but the moment they set foot on shore they come under the authority of the state, and may be arrested and tried like other foreigners if they commit crimes or create disturbances. Should they thus misconduct themselves and then succeed in escaping to their ship, the commanding officer ought, if the matter is at all serious, to punish them on the application of the local authorities or deliver them to the latter for punishment, the first course being in general preferable.[1]

§ 109

The remaining exception from ordinary rules with regard to territorial jurisdiction occurs in the case of

*Subjects of Western states resident in Eastern countries.*

It rests on special agreement, and not, like those we have been considering hitherto, on the common law of nations. It is maintained because of the defective character of much of the Oriental administration of justice, and the different views on the subject of trial and punishment entertained generally in Eastern and Western countries. In consequence of these considerations Christian states obtained by treaties called *capitulations* exemption from the local jurisdiction for their subjects resident in many Eastern lands under native rule. By Conventions with the rulers of these regions, reinforced sometimes by custom, authority over Europeans and Americans resident within their territories is given to consular courts. Thus consuls, who among Western nations are mainly commercial agents,[2] exercise in Oriental states important judicial functions, and possess large immunities conferred on them for the protection of their countrymen. Their jurisdiction is both civil and criminal. The manner of its exercise depends on the law of the country to which each consul belongs, on treaty stipulations between that country and others, and long-continued custom. Generally subjects of the local sovereign who may commit any crime

Exceptions to ordinary rules about jurisdiction : (4) Subjects of Western states resident in Eastern countries.

[1] [Cf. Hall, *International Law*, 7th ed., p. 208 *n.*]

[2] See § 131.

against subjects of a foreign state resident in their country are dealt with by the local tribunals; but subjects of a foreign state who may be charged with criminal offences against natives are tried in the consular court of their own nation. In cases that arise between subjects of different foreign nationalities, the aggrieved person can, in the absence of special treaty regulations, seek redress in the consular court of the country whose subject has done the wrong; and if two subjects of the same foreign nation stand to one another in the relation of accuser and accused, the case is tried in the court to whose authority both of them are subject. In civil matters questions that arise between a foreigner and a native are generally settled by a tribunal in which agents of both the foreign and the native state have a voice. When two or more foreigners of the same nationality are the parties to the suit, it is tried in their own consular court; and when the dispute is one between foreigners of different nations, it goes to the consular court of the defendant's country. As a rule there is an appeal in civil cases of great importance to the superior tribunals of the consul's country; and in criminal cases the highest sentences cannot be passed without the ratification of the home authorities. Sometimes it is arranged that persons charged with grave crimes should be sent home for trial. In order to gain the protection of a consul in the East it is necessary for subjects of the state he represents to register themselves at the consulate. Registration of the head of a family implies registration of all members of the family living under the same roof. Throughout the Turkish Empire England had a network of vice-consular and consular courts culminating in the court of the consul-general at Constantinople. [On the entry of Turkey into the great war, in 1914, she denounced this jurisdiction, but by Article 136 of the treaty of peace (still unratified) signed at Sèvres, Aug. 10th, 1920, she agreed to the replacement of the capitulations by a scheme of judicial reform, which is to be prepared by a Commissioner appointed within three months of the treaty coming into force.] The authority of British consular courts is derived from the Foreign Jurisdiction Acts (1843–1890) and Orders in Council made

in pursuance of them. The authority of the consular courts of the United States rests upon Acts of Congress passed in 1848, 1860, and 1870. But it must be noted that these acts and similar laws of other civilized and Christian powers could give no jurisdiction within the dominions of Oriental states, were it not for the treaties and customary rules whereby the right to establish consular courts is expressly granted by the local sovereigns.[1] In Egypt the consular system was superseded in 1876, after negotiations extending over nearly ten years, by a system of *mixed tribunals* commonly called international courts. The judges of these courts were partly natives and partly foreigners, the majority always belonging to the latter category. Their powers and functions were regulated by an elaborate code; and the appointment of the judges rested with the Egyptian administration, which was however, bound in selecting the foreign members of the courts to act on the recommendation of their respective governments. Fourteen powers, including the United States, assented to these arrangements,[2] which were much more satisfactory than the old consular courts. [The procedure by mixed tribunals will probably be modified in virtue of the change of British policy in Egypt in March, 1922.][3]

When countries hitherto governed by native rulers of the Oriental type pass under the sway of Christian and civilized powers, one of their first cares is to abolish the consular courts, so that they may become in reality masters in their own dominions; and the states who possess treaty rights to maintain such courts usually make no difficulty in renouncing them. Thus when France in 1881 established over the Tunisian Regency a protectorate which differed only in name from complete annexation, she commenced negotiations with the powers who had what is called consular capitulations with Tunis, and was able in 1884 to supersede the consular courts

[1] Halleck, *International Law* (Baker's ed.), ch. xi; *Foreign Jurisdiction of the British Crown*, pp. 132–203.

[2] Holland, *European Concert in the Eastern Question*, pp. 102, 183, 128–147.

[3] [See § 43.]

by French judges.[1] And again when in 1896 she turned Madagascar from a colonial protectorate into a French colony she negotiated with Great Britain for the recognition of the territorial jurisdiction of the French tribunals she established in the island. In 1897 she gained her purpose on giving a pledge to extend a similar recognition to the British tribunals which were about to be constituted in the British protectorate of Zanzibar.[2] And just as states of European civilization feel impelled to obtain the abolition of all privileges which may impede the exercise of territorial jurisdiction, when they have extended their dominion over countries where the system of consular courts has previously flourished, so do strong Oriental states when they have put in practice ideas of justice familiar to Western thought, desire emancipation from the restraints on their authority conceded in their days of weakness. When Japan, for instance, had shown in 1894 her strength and her civilization, the great European powers and the United States of America judged that her native tribunals would afford sufficient security for the lives and property of their subjects resident in her territory, and abolished by treaties with her government the jurisdiction of their consular courts. Great Britain led the way; the others followed; and by the end of the century her emancipation was accomplished.[3]

## § 110

We have now to consider the subject of Extradition, which may be defined as: *The surrender by one state to another of an individual who is found within the territory of the former, and is accused of having committed a crime within the territory of the latter; or who, having committed a crime outside the territory of the latter, is one of its subjects, and, as such, by its law amenable to its jurisdiction.* Such surrenders are usually made in pursuance of treaty obligations, though there are not wanting cases where criminals have been given up in the absence of

Extradition. A state is not bound to grant it in the absence of a treaty obliging it to do so.

[1] *Statesman's Year Book, 1894*, p. 523.

[2] British Parliamentary Papers, *Africa*, No. 8 (1897), p. 59.

[3] Hall, *International Law*, 7th ed., p. 54, note.

any stipulation on the subject. The earliest extradition treaty on record was negotiated about thirteen hundred years before Christ between Rameses II, King of Egypt (the Pharaoh who knew not Joseph), and Khitasir, King of the Khita. It provided for friendship and alliance between the two monarchs and for a strict return of fugitives from one another's dominions.[1] But the example set at so remote a period has not been followed to any great extent till recent times; and when agreements for mutual surrender were made, they applied more often than not to political offenders. The great mass of extradition treaties dates from the nineteenth century and even from its latter half. They have been rendered necessary by the rapid growth of intercourse between peoples and the great preponderance of opinion in favor of the doctrine that crime is in the main territorial.

Writers on International Law have differed greatly on the question whether a state is bound to surrender fugitive criminals unless it has contracted to do so by treaty. The majority of them favor the negative view, and the same may be said of statesmen and judges. Each state must decide for itself whether, in the absence of treaty stipulations, it will give up criminals or not; but it is now generally admitted that a surrender, though it has often taken place, is a matter of comity and not of right. There is no rule of International Law commanding governments to return to one another fugitives from justice on demand from the country where the crime was committed. The practice of states differs. In America it is held that in the absence of a treaty there is no law that authorizes the President to deliver up any one charged with having committed a crime in the territory of a foreign nation, or at least that there are grave doubts as to his right to do so.[2] Surrender was made in 1864 in the case of Arguelles, who was given up to the Spanish authorities for a crime of a peculiarly atrocious character, though there was then no extradition treaty with Spain; and on that occasion the Senate interfered with a request to be informed under what authority of law or treaty

[1] Burgsch, *Egypt and the Pharaohs*, vol. II, pp. 71–76.

[2] Note on Extradition in *Treaties of the United States*, pp. 1289 and 1291.

the act was done. Mr. Seward, the secretary of state, admitted in his reply that the United States was under no obligation to make the surrender, and justified his action on the grounds of comity and humanity. The attempts to stop the surrender failed, but the question of the power to make it was never judicially decided.[1] The law of England appears to be strongly against surrender. It is held that the common law gives the executive no power to arrest an alien and deliver him to a foreign state.[2] The crown has a right to negotiate extradition treaties; but their provisions cannot be brought into effect without statutory authority. The Extradition Act of 1870 gives the Crown power by Order in Council to carry into effect all extradition treaties made in accordance with its terms; and in the United States statutes passed in 1848 and 1860 enable the courts to act under duly proclaimed extradition treaties. Thus the two great English-speaking peoples have adopted practically the same principles in this important matter. In France, on the other hand, the received legal doctrine is that the state authorities have an inherent right to surrender fugitive criminals if they think fit to do so, and the French view finds favor in most civilized countries. Even the United States and Great Britain do not hesitate to take advantage of it and ask foreign states with whom they have no agreements for extradition to surrender on the ground of comity fugitives whom they would not themselves give up were the positions of the countries reversed. Thus in October, 1893, the Government of Washington obtained from Costa Rica, although there was no extradition treaty between that country and America, the surrender of a fugitive named Weeks, who was accused of embezzlement within the United States.[3]

[1] Wheaton, *International Law* (Dana's ed.), p. 183, note; Moore, *International Law Digest*, vol. IV, pp. 246–253.

[2] Clarke, *Extradition*, ch. V.

[3] Stephen, *History of the Criminal Law*, vol. II, p. 66; *Treaties of the United States*, note on Extradition, pp. 1289–1293; Moore, *International Law Digest*, vol. IV, pp. 253–258.

§ 111

The conditions generally inserted in extradition treaties.

But these questions of the common law of nations and the limits of the executive authority of domestic governments are becoming year by year less important, owing to the almost universal adoption of extradition treaties, and the greatly enlarged list of crimes that now find a place within them. One example will suffice to show the immense progress made in this latter respect within recent times. The extradition clauses of the treaty of 1842 between the United States and Great Britain made mention of seven crimes for which surrender could be demanded, but to these seven the Convention of 1890 added twenty others.[1] It is now the usual custom to embody various conditions in extradition treaties and to refuse to give up an offender unless they are met. Reasonable prima facie evidence of the guilt of the accused is almost invariably demanded; and it is clear that great injustice might result if a state surrendered fugitives on the mere assertion of a foreign government that they were guilty of crime. The extraditing state does not claim to try the accused parties and find them guilty before it will give them up, but it requires sufficient evidence to satisfy its own tribunals that the cases are genuine and ought to be tried. Another condition generally laid down in recent treaties is that the individual demanded shall not be tried for any offence committed prior to his surrender, other than the extradition crime, until he has been liberated and has had an opportunity of leaving the country. The object of this proviso is to guard against the surrender of a person for one offence when the real reason for demanding him is to try him for another, possibly a political crime, possibly an offence not mentioned in the treaty. The condition is perhaps not unreasonable in view of the great divergencies of political condition and theory between some of the most powerful states of the civilized world, though it might easily operate in favor of a criminal whom it was eminently desirable to punish. It is embodied in the treaty of 1890 between Great Britain and the United States, but it does

[1] *Treaties of the United States*, p. 437; British Parliamentary Papers, *United States*, No. 1 (1890).

not appear in the treaty of 1842. The British Extradition Act of 1870 which, with further acts passed in 1873, 1895, and 1906, constitutes the British statute law on the subject, declared that it must be inserted in any extradition treaty put in force by the Crown. In these circumstances the late Earl Derby, when foreign secretary in 1876, declined to surrender the forger Winslow and other fugitives, unless the American Government would give an undertaking that they should not be tried for any offence other than that for which their extradition was demanded. The United States declined to make stipulations and assurances not provided for in the treaty which then governed the situation. For some time neither side would give way, and in consequence several fugitives from justice escaped surrender. But towards the end of the year the British Government receded from its untenable position, and the American administration indicated that they were not disposed to try extradited offenders for any crime except that which had caused their surrender. The matter has been set at rest by the decision of the Supreme Court in the case of Rauscher, who was brought to trial for the cruel and unusual punishment of a sailor, his extradition having been obtained from Great Britain on the charge of murdering the same man. In 1886 the court quashed the proceedings on the ground that a fugitive extradited for one offence could not be tried for another until opportunity had been given him to return to the country which had surrendered him.[1] This decision and the Convention of 1890 have placed the matter as between the two nations beyond the slightest possibility of doubt.

The most important and most difficult of the conditions to be found in most modern extradition treaties is that which forbids surrender if the offence is of a political character. There is no agreement among states as to the nature of a political offence or the marks that differentiate it from other offences. Jurists have been unable to set forth any uniform doctrine; and when cases have come before courts of law, the judges have as a

[1] *Treaties of the United States*, note on Extradition, p. 1293; Moore, *International Law Digest*, vol. IV, pp. 306–311.

rule shirked the difficulty of a general definition and been content to determine whether or no the individual before them was a political offender. With regard to purely political offences, by which must be understood acts committed in the course of an insurrection or civil war, the distinction enunciated in the thirteenth of the resolutions on the subject passed by the Institute of International Law at Oxford in 1880 and Geneva in 1892, seems as satisfactory as is possible in such a complicated matter. It provided for a refusal of extradition unless it was demanded for acts forbidden by the laws of war.[1] Thus in 1890 the British Court of Queen's Bench refused the extradition of a Swiss, named Castioni, who had been concerned in an insurrection against the authorities of the Canton of Ticino, in the course of which he had shot a fellow-citizen during an attack upon the municipal palace at Bellinzona. In that case it was the connection of the act with a political movement of which it formed a part which, in the judgment of the court, gave it a political character. It was "incidental to and formed a part of political disturbances,"[2] and we may add that it was an act which would have been perfectly lawful in a regular war. Four years afterwards the same court laid down in the case of the anarchist Meunier, whose extradition was demanded on a charge of causing explosions in a Paris café and a French barrack, that "in order to constitute an offence of a political character, there must be two or more parties in the state, each seeking to impose the government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not."[3] There is a wide gap between these two views. The doctrine that an offence is political when it is part and parcel of a conflict between two parties for the control of the government differs materially from the doctrine that no offence is political unless it is committed in the course of such a conflict. The latter not only deprives, as does the fourteenth of the resolutions of the Institute of International Law on the

[1] *Tableau Général*, p. 106.
[2] *In re Castioni*, L. R. [1891] 1 Q. B. 149, 166.
[3] *In re Meunier*, L. R. [1894] 2 Q. B. 415, 419.

subject,[1] anarchists and enemies of society of the protection of the rule that political offenders are not to be surrendered, but it renders extraditable offences committed by solitary patriots or small groups with a view, as Professor Westlake points out,[2] to rousing their countrymen and initiating a movement against the authorities. In short, it fails to meet those difficult cases where the act is both political in motive and object and also on ordinary crime, the *délits politiques complexes* of French Law. One may be unable to see why rulers, whether republican or monarchical, should be preserved like game for the battues of excited enthusiasts, and yet desire a test capable of distinguishing vulgar and abominable crimes, even when done against political personages and for political objects, from the honorable efforts of noble and self-sacrificing men to free their country from what they honestly regard as grievous misrule.

No such test has been found yet. It is obvious that complex or relative political offences differ greatly from the purely political offences connected with a civil struggle between two or more parties in a state. In a certain capital the people raise barricades and defend them against the troops. One of the insurgent citizens shoots an officer who is leading an attack. No one doubts that he ought not to be surrendered if the movement fails and he escapes to a foreign state. What he did was practically an act of war, and as such came well within the laws of war. In another capital a discontented citizen endeavors to seize government funds in order to finance a revolutionary movement that he hopes to set afoot. In the course of his attempt he kills the guardian of the funds, who has discovered him. Here is an act which is at once political and a common law crime. How are we to decide whether the government of another country ought to deliver the perpetrator up for trial if he succeeds in reaching its territory? We are often bidden to make the motive the great test. But motives are hard to fathom and often mixed. Moreover, there seems no reason why a man should escape punishment for any

[1] *Tableau Général*, p. 106.

[2] Westlake, *International Law*, part 1, p. 247.

crime, however atrocious, by showing that his motives were political. And the same may be said of political purposes. Is the slaughter of a whole family of young children to be accounted a political crime for purposes of extradition, because the assassin, a benevolent monomaniac, persuaded himself that he would do God and man service by ridding the world of a tyrant brood which he honestly believed to be a curse to it? So strong is the feeling that the perpetrators of such deeds should not be sheltered as political offenders that several states which cannot be accused of lack of attachment to political liberty have taken steps to prevent the assertion of any claim to asylum on their behalf. Belgium, for instance, which owes its statehood to a successful revolution, passed in 1856 a law removing from the category of political crimes the murder, or attempted murder, of the head of a foreign state or any member of his family, and the United States has several extradition treaties containing stipulations to the like effect.[1] If the principle is good that private assassination as distinct from slaughter in the course of open fighting, whether during war or insurrection, is not to be accounted a political offence, surely it ought not to be confined to heads of states and their families, but should be applied to all who bear rule from the heads of administration down to the humblest soldier or policeman. The difficulty of dealing with *délits politiques relatifs* is not overcome by a partial solution applicable to one class and one crime. We need something general in its operation; and in default of a simple and universal test, it seems best to leave each case to the judicial rather than the political department of government, and to instruct the courts to refuse extradition only when in their judgment the political elements in the offence outweigh the elements of ordinary crime. They would then consider motive and purpose, but only as two among the factors that made up the case. Another alternative of an ingenious kind has been put forward by Despagnet. He suggests that extradition should be granted in the mixed cases we are considering, but only on condition that the surrendered ref-

[1] Oppenheim, *International Law*, vol. I, § 335; Moore, *International Law Digest*, vol. IV, pp. 352–354.

ugee should be dealt with as an ordinary criminal, and not as a political offender.[1]

Great Britain and America are the only states of first-rate importance who are willing to surrender their own subjects to a foreign jurisdiction for trial on account of offences committed in foreign territory, and even they have consented to stipulations for the contrary practice in some of their extradition treaties. Most countries decline to carry the principle of the territoriality of crime to its logical conclusion, though there is a strong body of opinion among international jurists in favor of so doing.[2] Offenders are either in their own country, when it has assumed jurisdiction over its subjects for offences committed abroad, and they have been obliging enough to return to it, or they have escaped unpunished. There seems little reason for a course of action dictated either by an exaggerated notion of a citizen's privileges or by a profound distrust of the administration of justice in foreign lands. A case can always be watched, and in the unlikely event of its being conducted with manifest unfairness, remonstrances can be made. If civilized states have sufficient confidence in one another to enter into extradition treaties at all, they ought to be willing to surrender their own subjects when occasions arise.

[Where an irregularity has been committed by the agents of a state in surrendering an escaped prisoner to the authorities of another state, it would appear that, if these agents acted in good faith, it is not necessary that the prisoner should be restored to the state which employs them and subsequently disowns their acts. An Indian revolutionary, Savarkar, charged with murder in connection with a political movement, escaped from a British mail steamer, the *Morea*, to the French port of Marseilles, at which the *Morea* touched while she was conveying Savarkar from India to England. French agents arrested him, and in mistaken execution of their duty sent him back to the *Morea* without any extradition proceedings. The ship then left Marseilles. The French government, which

[1] *Droit International Public*, § 291.

[2] Moore, *International Law Digest*, vol. IV, pp. 187–304; *Tableau Général*, p. 104.

had been notified that the *Morea* would call at Marseilles and had instructed its agents there not to facilitate any attempt at escape by Savarkar, now repudiated their action, and claimed that he should be returned by Great Britain; but the Hague Tribunal, to which the dispute was referred, decided in 1911 in favor of Great Britain. The case is somewhat weakened as a precedent by the peculiar circumstances to which the decision was confined.][1]

[1] [Bentwich, *Cases in International Law*, p. 109. *American Journal of International Law*, vol. v, p. 520. Pitt Cobbett's *Leading Cases on International Law*, 4th ed., p. 253.]

## CHAPTER IV

### RIGHTS AND OBLIGATIONS CONNECTED WITH EQUALITY

§ 112

From the time of Grotius to the present day publicists have declared that all independent states are equal in the eye of International Law. The equality they speak of is not an equality of power and influence, but of legal rights. They hold that the smallest and weakest of independent political communities has exactly the same position before the law of nations as the strongest and most extensive empire. Doubtless this theory was for a long time productive of great good. It gave weak states an admitted principle of appeal in the case of aggression from stronger neighbors; and though it did not often prevent high-handed wrong, it placed the brand of illegality upon transactions of the order familiar to readers of the fable of the wolf and the lamb. And the result was that when helpless states were wantonly attacked, the aggressor invented some plausible excuse. The weaklings had been themselves guilty of a wrong which must be punished, or the Balance of Power was seriously disturbed on account of their nefarious conduct, or they were meditating outrages upon neighbors who were therefore reluctantly compelled to attack them in self-defence. Thus a certain amount of lip-service was done to the principles of morality; and some respect for International Law was maintained in the midst of transactions that were in reality lawless.

The meaning and utility of the principle of equality.

§ 113

But an examination of modern international history reveals a number of facts which it is hard to reconcile with the old theory of the complete equality of all fully sovereign states. They seem to point instead to a primacy on the part of the foremost powers of the civilized world. If we direct our

attention at first to Europe, as the nest in which International Law was nourished into vigorous life, we find that at the beginning of the last century a certain leadership was assumed by the powers who had borne the brunt of the struggle against Napoleon. At the Congress of Vienna in 1814 and 1815, France, conquered though she was, succeeded in gaining a place by their side, and in 1818 she was formally admitted to an equal share in their deliberations and decisions.[1] Thus was constituted the Concert of Europe. It consisted originally of England, France, Austria, Prussia (since merged in Germany), and Russia, and in 1867 the newly created kingdom of Italy was added. It has passed through periods of greater and lesser vigor; but, if now and again it has seemed for a time to be in abeyance, it has always reasserted its position and authority. To describe its activity with fulness would be to write a large part of the international history of Europe during a century crowded with great events. The performance of such a task is neither possible nor desirable in the midst of a treatise on International Law. All that can be done here is to give such a brief summary as will be sufficient to call attention to the main facts.

Facts hard to reconcile with the theory of equality.

The Great Powers, as we have just seen, called into being the European order that succeeded the wars of the French Revolution and the conquests of Napoleon, and have supervised many of the important modifications of it which have since taken place. The kingdom of Greece has grown up under the tutelage of the European Concert, which has more than once restrained it, once secured for it additional territory, and once at least preserved it from destruction. The most active part in its establishment in 1832 was taken by England, France, and Russia.[2] In the case of Belgium all the Great Powers were formally concerned from the first in its severance from Holland, and all concurred in its neutralization as

[1] Dupuis, *Le Principe d'Équilibre et le Concert Européen*, pp. 114–198; Westlake, *Chapters on the Principles of International Law*, pp. 92–101.

[2] Holland, *European Concert in the Eastern Question*, pp. 4–69; Dupuis, *Le Principe d' Équilibre et le Concert Européen*, pp. 195–198, 373–400.

an independent state in 1839.[1] One of the main objects of the Crimean War, and the only one that has been permanently attained, was to take the power of settling the destinies of the subject Christian populations of Turkey out of the hands of Russia alone, and intrust it instead to the Concert of Europe. Though Austria and Prussia had not been belligerents, they were admitted as Great Powers to the conference that drew up the Treaty of Paris in 1856. And again, in 1878, Russia was not allowed to impose her own terms on Turkey, but they were submitted to a conference, in which England, France, Germany, Austria, and Italy took part, though none of them had been engaged in the conflict. The congress discussed exhaustively the questions raised by the war, and substituted the Treaty of Berlin for the Treaty of San Stefano, which was regarded as a preliminary document to be modified by general consent. The readjustments that have taken place since have been matters of negotiation between the powers.[2] The annexation of Bosnia and Herzegovina by Austria in 1908 gave rise to an acute controversy which is summarized in the next chapter.[3] In addition to superintending and controlling the territorial and political changes we have described, the Great Powers received Turkey into the family of nations in 1856, made provision in the same year for the due execution of international works at the mouth of the Danube, conferred the rank of a Great Power on Italy and neutralized Luxemburg in 1867, and granted conditional recognition of independence to Roumania, Serbia, and Montenegro in 1878.

The territories already referred to belong geographically to Europe; but this cannot be said of Egypt, and yet the European Concert has concerned itself with that country. The explanation is to be found in its close political connection with Turkey, its great strategic value, and its position on the most important highway between East and West, a position which the opening of the Suez Canal in 1869 rendered more commanding than before. European interests predominated in her, and therefore the Concert of Europe naturally concerned itself

[1] Dupuis, *Le Principe d'Équilibre et le Concert Européen*, pp. 199–230.
[2] *Ibid.*, pp. 350–410. [3] See § 134.

with her.[1] But the vast territories drained by the Congo and the Niger, and their affluents, have no such close connection with Europe. Yet when it became necessary in 1884 to regulate commercial interests and provide for the development of civilized rule within them, the conference that assembled for that purpose was composed of representatives not only from thirteen European powers but also from the United States of America. Silent but eloquent testimony was thus borne to two great facts. The first is that the state-system of Africa is an offshoot from the state-system of Europe, and is therefore supervised by the Great Powers of Europe, all of whom took part in the Congo Conference, though two of them had no territorial and commercial interests at stake. The second was equally important from the point of view of later developments. It was that when commercial and humanitarian affairs are concerned on a scale of international importance, the voice of the United States must be heard in the settlement. That is to say, there is a Concert wider than the Concert of Europe, and in it the great American Republic is certainly included. In the beginning of her independent career, her fixed policy was to refrain from entangling herself in European broils, and Europe in its turn was bidden to keep its hands off American affairs. The earth was smaller then than it is now, and Europe was by far the larger part of it. The only alternative to joining in the game of European statecraft was isolation. To-day the whole world has been opened up to international activity. Asiatic, African, South American, and Oceanic problems task the faculties of statesmen, and influence the welfare of mankind. A vast and powerful state cannot live alone, simply because it is not alone. Its rulers must take account of the forces that act and react on their own people. American statesmen have, therefore, been obliged to play a part in the evolution of a new international order. They could indeed refrain from troubling themselves about the Balance of Power in Europe, and insist that the European political system should not be extended to their hemisphere; but the very act of doing so brought them into contact with other pow-

[1] See § 43.

ers, and in 1898 a successful war, caused in part by the time-honored policy of reducing to a minimum European influence in American affairs, gave them control of territories far outside their earlier boundaries. Moreover, they could not refuse to take an interest in the freedom of commerce on the great African rivers, the extension of "the policy of the open door" in China, and the diminution of the curse of slavery throughout the world with a view to its eventual abolition. But with matters such as these political interests are bound up; and so it has come to pass that a great world-power has been obliged, almost against its will, to take part in world-affairs. An American plenipotentiary sat at the Morocco Conference of 1906, side by side with the delegations of the Great Powers and the states that had signed the Treaty of Madrid of 1880.[1] It might have been argued that the representatives of the United States attended the Congo Conference simply and solely in the interests of common humanity and American trade, and that the claims of the former alone drew them to the great Brussels Anti-slavery Conference of 1890. But it can hardly be maintained that they went to Algeciras without any regard to the main object of the meeting, which was to preserve the peace of Europe by reconciling the claims of Germany on the one hand and France and Spain on the other, in respect of "the pacific penetration" of Morocco. [And the remark applies with still more force to President Wilson's attendance at the Peace Conference at Versailles after the great war.]

The state system of Asia, unlike that of Africa, shows some signs of separate and independent life. It would be impossible to-day for Russia, France, and Germany to deprive Japan of the most precious fruits of victory, as they forced her in 1895 to restore Port Arthur to conquered China; nor would Germany, Russia, Great Britain, and France be likely to obtain from China leases of parts of her territory, as they did in 1898. The position of Japan has improved so enormously that she is now not only independent in fact as well as in name, but has also risen to the rank of a Great Power. China, too, has been transformed; but her government must attain to a much higher

[1] Dupuis, *Le Principe d'Équilibre et le Concert Européen*, p. 481.

standard of knowledge and efficiency, and rid itself of much corruption, before she can take a secure and honored place in the society of nations. Outside the territory of these two powers, though there is much unrest, there is little international life that Europe does not control. Most of the Continent belongs to European states. Their aims in government, their views of native development, their agreements and rivalries among themselves, dictate the policies carried out on its surface. Japan has been consulted in the rearrangement of the continental part of Eastern Asia, and those who sat in conference with her have come from European nations, with the exception of the representatives of the United States of America, who were present. It is now unlikely that Asia will develop an international polity of her own, for recent events indicate that an Asiatic system may become part of a great world-system.

This brings us to a most important point. We have seen that there is a Concert of Europe. We have also seen that there is not a Concert of Africa, or a Concert of Asia, as distinct from the Concert of Europe. But is there not a Concert of the World? Governments have learned that there are many matters which concern the whole of civilized mankind. Within the last half-century they have acquired the habit of meeting together by their representatives for the transaction of common business of all sorts; and provision has been generally made on such occasions for the subsequent acceptance of the conclusions reached by those states who were not able or willing to take part in the proceedings. We have had agreements of all kinds — Geneva Conventions, Postal Conventions, Railway Conventions, Wireless Telegraphy Conventions, Copyright Conventions, Sugar Conventions, Conventions for the Protection of Submarine Cables, and even a Convention for Putting down the Sleeping Sickness.[1] Some of these are so general as to be practically universal. Others are partial. But all testify to a growing solidarity among the nations, and a desire to develop organs for the purpose of common action.

[1] See Article by Professor Paul S. Reinsch on *International Unions and their Administration* in *The American Journal of International Law*, July, 1907.

It was this feeling which rendered possible the Hague Conferences of 1899 and 1907,[1] [the institution of the League of Nations in 1919, and the Conference at Washington in 1921]. Combination for what we may call business purposes led to the establishment of a rudimentary international legislature, and the creation of the machinery for calling together judicial tribunals to settle international disputes. And just as the Great Powers of Europe act the part of leaders when important matters that concern all the states of Europe come up for settlement, so do the Great Powers of the World take the lead when all the states of the civilized world come together to settle grave questions connected with the preservation of peace and the humanizing of war. In both cases the leadership is not defined or limited by hard and fast rules. It is indefinite, but nevertheless very real. The second Hague Conference failed to settle a number of important questions connected with capture at sea in time of war, though it succeeded in producing an excellent plan for the establishment of an International Prize Court. The great World-Powers, therefore, came into conference at London in December, 1908, and in the course of the following three months agreed on a Declaration which endeavored to settle nearly all the points at issue, [but which was never ratified.] Spain and Holland were, for various reasons, invited to the Conference of London, but they did not come as Great Powers. While the episode proves that a certain hegemony is vested in the World-Powers, it also shows that the position itself, and all the procedure relating to it, is vague and indefinite. [Before the great war, Great Britain, France, Germany, Austria, Russia, Italy, the United States of America, and Japan constituted the World-Powers. Since the war, the heavy defeat of Germany with its consequent naval and military limitations, and the instability and degradation of government in Russia, have reduced those states at least temporarily to the rank of second-rate Powers. Austria has been shorn of so much of her territory and population that she has not only ceased to be a World-Power, but it is unlikely that she will recover her position as one.]

[1] See § 32.

§ 114

The present a period of transition.

We must be cautious in drawing inferences from the facts just recited. Attempts are made to reconcile them with the doctrine of the equality of all sovereign states by pointing out that what they establish is a political inequality, whereas what the old theory asserted was a legal equality.[1] It is a grave question whether the legal and the political aspects of the problem can be parted and kept separate in this way. The distinction holds good in a state where there is a legislative body to make the law and a judicial body to interpret it, and not even unanimous consent to a political arrangement can make it legal unless the legislature enacts it and the judges enforce it. But in a system of rules depending, like International Law, for their validity on general consent, what is political is legal also, if it is generally accepted and acted on.[2] In the society of nations consent has the force of law, and general consent is shown not only by express agreement, but still more by continuous custom. If, therefore, the authority of the Great Powers has been acknowledged so constantly for the greater part of a century that it has become a part of the public order of Europe, and is accepted and even invoked by the smaller states of Europe, any description of it which refuses to recognize its legality seems inadequate, if not inaccurate. The European Concert is a legal organ of Europe in much the same sense that the diplomatic service of a state is a legal organ of that state. But it is still in a rudimentary condition, as was the diplomatic service itself three hundred years ago. Moreover, its procedure is by no means fixed. Sometimes it admits to its deliberations the smaller states concerned in the matter at issue, and sometimes it excludes them. The fact that a small state signed in the past a treaty that is to be revised in the present, sometimes causes it to be invited to the council board, while a Great Power is summoned as such, even though it was not a signatory. In fact, procedure is dictated by the convenience of the moment, without much regard to consistency or precedent.

[1] See Oppenheim, *International Law*, vol. I, Pt. I, ch. II.

[2] [Cf. Oppenheim, *op. cit.*, p. 200 *n.*]

No binding custom has yet arisen concerning it; and the same may be said of the method of giving effect to the decisions of the Concert. Sometimes it enforces its authority by war or the threat of war; sometimes one or two of its members take on themselves to compel submission to its dictates; sometimes it merely gives advice.

It is not contended that the primacy of the Great Powers confers on them in their individual capacity any greater rights than those possessed by other members of the family of nations. In matters connected with property, jurisdiction, and diplomacy, they are on the same footing as their smaller neighbors, nor do they claim as belligerents or neutrals privileges that would not be accorded to the weakest of independent states. It is only when they act collectively that they possess a superintending authority not granted to any temporary alliance. Europe allows them in some matters to speak on its behalf. The arrangements they make are accepted and acted upon by other states, not only when they refer to the redistribution of territory, which might be regarded as an accomplished fact to be noted, whether effected by fair means or foul, but also when they remodel political arrangements in such a way as to impose continuous obligations upon other powers who were not admitted to their councils. The neutralization of Belgium, for instance, was, whilst it existed, regarded as under the protection of the public law of Europe, and every European state was held bound not to attack the Belgian kingdom as long as it fulfilled the fundamental conditions of its existence. But it was erected and neutralized by the action of the Great Powers, who gave it the peculiar status that it possesses. They, therefore, burdened the rest of Europe with fresh obligations; and the fact that they were allowed to do so, not only in this case but in many others, shows that their position of primacy is recognized by tacit consent. The future alone can decide whether their present limited and ill-defined authority will become formal and general. There is no moral or jural necessity about the doctrine of equality. The society of nations has changed its form in the past, and there is nothing inherently improbable

in the idea that it is experiencing another change in our own time. It may be working round again to the old notion of a common superior—not indeed a pope or an emperor, but a committee, a body of representatives from its leading states. If this is the real explanation of the phenomena we have attempted to describe, probably the new organization will be world-wide rather than European, and the Great Powers of the future will be the leading members of the society of nations without regard to geographical situation.

But we must not speak with absolute confidence about the future of a development which has only just begun. The European Concert has been in existence for nearly a century, and we can generalize from considerable experience of its activities. But the World Concert can hardly be dated back further than the Hague Conference of 1907, when Japan obtained a recognized position among the Great Powers by being accorded, along with the seven who already ranked as such, the right of a summons for her judge to sit at every meeting of the International Prize Court.[1] In 1908–1909, the Great Powers of the world met in that capacity in an International Conference; and on that occasion the Declaration of London was the result of their labors. [Excluding Russia and the defeated German and Austrian Empires, they met again at the Peace Conference at Paris in 1919, and concluded with Germany the Treaty of Peace in which was incorporated the constitution of the League of Nations. The United States of America, owing chiefly to its dislike to any possible entanglement in European affairs and to certain defects in form and substance which the Treaty exhibited,[2] did not ratify it. But in 1921, it acted as a pioneer in the extremely important conference at Washington for the limitation of armaments and the solution of problems in the Pacific. In addition to the United States of America, Great Britain, France, Italy, and Japan attended this Conference. Great as their achievements are, it would be unwise to deny that there are influ-

[1] Whittuck, *International Documents*, p. 195; *Supplement to the American Journal of International Law*, vol. II, p. 183.

[2] [American Journal of International Law, vol. XIV, pp. 155–206.]

ences that make against, as well as for, the hegemony of the Great Powers.] There is on the one hand the feeling that objects to any organization of international society because it limits the power of a strong and masterful state to dictate at the moment such rules as it deems to act in its own favor, and on the other the idea that anything which militates against the absolute equality of all independent states in all matters is to be reprobated as an attack on international justice. These two extremes meet in their opposition to anything like a Cabinet Council of the nations. It has yet to be seen whether they will prevail. The matter rests in the last resort with the opinion of the rulers and peoples of civilized mankind. The theory that states become Great Powers whenever they possess the elements of strength for war more abundantly than their neighbors takes into account only half the facts. A state does not become a Great Power because it is strong, though it cannot be a Great Power without being strong. The tacit consent of other states, and the action of those who were Great Powers before, give it the position. And the Great Powers themselves as a body are something very different from a band of international bludgeon-men. They perform functions of guidance and direction from which other states derive great benefit. Their position is accepted because the society of nations feels the need of their authority. If they cease to be useful their preëminence will depart from them. If their services become more marked as time goes on, they will develop into a regular organ of international life.

§ 115

The state-system of the American continent is unique. It cannot be regarded as in any respects as an appendage of the state-system of Europe. American states share with European states the benefits of membership in the society of nations, and hold themselves bound by International Law. But they emphatically repudiate any exercise of authority on their soil by the Concert of Europe or any alliance of European powers. Indeed the greatest and strongest among them, the United States

The state-system of the American continent.

of America, set herself early in her independent career to prevent any interference on the part of the Old World. The doctrine of Washington's Farewell Address, eloquently paraphrased by Jefferson in his inaugural in the famous words, "peace, commerce, and honest friendship with all nations—entangling alliances with none," grew in the hands of President Monroe, and under the circumstances connected with the project of the Holy Alliance to restore the dominion of Spain over her revolted American colonies, into an assertion that the United States would consider any attempt on the part of European powers "to extend their system to any portion of this hemisphere as dangerous to our peace and safety." The same message of December 2, 1823, declared that "the American continents by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers." These two principles taken together form the Monroe Doctrine, which has been repeated again and again in documents emanating from the executive department. It has been the subject of a vast amount of comment, and the glosses upon it sometimes go far beyond the original text. We will not attempt to collect, still less to reconcile, the various statements that have been put forth from time to time. What we have to do is to make clear the position which the United States does in fact occupy with regard to the other powers of the New World.

It has entered into no formal alliance for mutual support with the other American republics; but nevertheless it has acted again and again on the principles laid down by President Monroe. Lapse of time has taken away the point from the declaration against the increase of European dominion by way of further colonization on American soil;[1] for no one now, or for some generations past, has doubted that every part of the continent has passed under the sway of a civilized state, and is no longer open to occupation in the technical

[1] It is arguable that the frozen islands of the extreme north are in law *res nullius*, but climatic difficulties must prevent occupation in any real sense.

sense. But the strong objection against the extension of the state-system of Europe across the Atlantic has been widened so as to cover any acquisition of territory by European powers, or any intervention on their part for the purpose of setting up a new form of government. More than once Great Britain and France were informed that the United States would not see with indifference the transfer of Cuba from Spain to any other European power. The Clayton-Bulwer Treaty of 1850 bound England not to exercise dominion over "any part of Central America," and in the course of the long discussions that followed as to the exact meaning and extent of the obligation thereby imposed, persistent diplomatic pressure at last prevailed on the British Government to give up the protectorate it had acquired long before the treaty was signed over the Indians of the Mosquito Coast.[1] The French intervention in Mexico coincided in point of time with the great American Civil War; but the Federal Government, preoccupied as it was, did not neglect to protest whenever opportunity offered, not indeed against the attack on Mexico by France but, against the attempt on the part of the French army of occupation to destroy the Republican institutions of the country and set up an emperor, contrary, it was maintained, to the wishes of the great majority of the Mexican people. The downfall of the Confederacy enabled the administration at Washington to act with greater vigor than before; and its energetic remonstrances, coupled with the knowledge that if they were disregarded force would in all probability be used, caused France to withdraw her troops and led to the speedy downfall of the unfortunate Emperor Maximilian.[2] Spanish sovereignty was brought to an end in Cuba by the war of 1898, and the island has been launched on a state-life of its own under the benevolent tutelage of the great American Republic.[3] But, while the United States acts as warder of the continent for the purpose of keeping the European state-system out of the New World, it recognizes that circumstances may arise in which it is the

[1] Message of President Buchanan, December 3, 1860.

[2] Moore, *International Law Digest*, vol. VI, pp. 488–507.

[3] See § 39.

right and duty of a transatlantic power to exact reparation from an American state. In that case it will not interfere as long as the demands of the injured government do not take the form of the cession or permanent occupation of territory. Thus, when in 1901 Great Britain, Germany, and Italy contemplated the use of force against Venezuela in order to make the country discharge various claims and contractual obligations, President Roosevelt wrote in his message of December 3, "We do not guarantee any state against punishment if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American power."[1]

It is necessary to speak with caution in describing the present position of the United States with respect to the other powers of the American continent; but the facts seem hardly consistent with the old doctrine of the absolute equality of independent states. The words of Mr. Fish in his Report of July, 1870, to President Grant more accurately define it. The secretary of state says, "The United States, by the priority of their independence, by the stability of their institutions, by the regard of their people for the forms of law, by their resources as a government, by their naval power, by their commercial enterprise, by the attractions which they offer to European immigration, by the prodigious internal development of their resources and wealth, and by the intellectual life of their population, occupy of necessity a prominent position on this continent which they neither can nor should abdicate, which entitles them to a leading voice, and which imposes on them duties of right and of honor regarding American questions, whether those questions affect emancipated colonies, or colonies still subject to European dominion." This statement is correct both in fact and in theory, if we except from the last clause of it the internal affairs of the few remaining European colonies in the New World. It will hardly be contended that the Government of Washington has any right, moral or legal, to qualify the independence of the countries to which they belong by meddling with their domestic affairs.

The principle set forth in the quotation just given is

[1] Moore, *International Law Digest*, vol. VI, p. 590.

respected by the leading European powers. It may be taken for granted that under existing conditions they will not attempt to increase their dominions by the addition of fresh territory in the New World. [Indeed, what may be called the territorial side of the Monroe Doctrine has been applied to preventing the commercial use of lands in Mexico by private citizens, where such use might give real control of the lands to a foreign power, and thus imperil the United States. Thus, an American company secured from Mexico a tract of land, several million acres in extent, bordering on Magdalena Bay. The enterprise of the company was a failure, and its principal creditor, a citizen of the United States, took over its property and consulted his government as to whether he could sell the land to Japanese subjects. The opinion of the authorities was unfavorable to him and called forth the resolution of the Senate of the United States, in 1912, "that when any harbor or other place in the American continent is so situated that the occupation thereof for naval or military purposes might threaten the communications or the safety of the United States, the government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to another government, not American, as to give that government practical power of control for national purposes."[1] The Covenant of the League of Nations, 1919, provides that nothing in it "shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace" (Article 21). This does not define the doctrine; much less does it incorporate it as a rule of International Law. In fact, the Monroe Doctrine is nothing more than a time-honored expression of American foreign policy, which, as President Wilson said in 1916, "was proclaimed by the United States on her own authority, and always will be maintained on her own responsibility."][2] The question of disputed frontiers presents some difficulty in connection with the Monroe Doctrine. It is

[1] [*American Journal of International Law*, vol. VI, pp. 937–939.]

[2] [*Ibid.* vol. XIV, p. 208; Oppenheim. *International Law*, vol. I, § 139.]

possible under color of settling a boundary to claim territory that undoubtedly belongs to a neighbor; and if such a case should occur between an European colony and an American republic, it would come within the meaning of the Monroe Doctrine. But when a mass of territory has never been divided by common consent, but has been in dispute from the beginning, it is difficult to see how the United States can reconcile with respect for the independence of other powers any claim on its part to a preponderant voice in the settlement, merely because the disputed tract happens to consist of American soil. The case arose when President Cleveland in his special message of December 7, 1895, assumed a right to investigate and determine the boundary between British Guiana and Venezuela, and then to enforce the decision on Great Britain at the point of the sword. Fortunately wise counsels on both sides prevented war; and by the Anglo-Venezuelan treaty of 1897, negotiated in close agreement with the United States, the dispute was referred to the decision of an impartial board of arbitrators.[1]

The determination of the United States to exclude the European state-system and European intervention from the American continent involves the exercise of its own authority in the last resort, when chronic misgovernment and persistent wrong-doing endanger the existence of civilized society and produce external complications. In Europe international nuisances are mitigated, if not removed, by the action of the Great Powers. In America they must be abated by the United States. President Roosevelt saw clearly that this was an obligation imposed by insistence on the Monroe Doctrine. In the crucial case of Santo Domingo he carried his views into action by negotiating an arrangement, whereby an American receiver-general of customs and his staff collect the duties which are practically the whole Dominican revenue, and after handing over forty-five per cent to the government of the Republic, apply the remainder to the repayment of its debts. In a remarkable message to the Senate, dated February 15, 1905, he justified intervention by pointing out that

[1] Moore, *International Law Digest*, vol. VI, pp. 579–583.

the country had fallen into such a condition of anarchy that a year before no less than three revolutions were proceeding at the same time. Customs-revenues were pledged to foreign creditors, but the first enterprise of an insurrectionary band was to take possession of a customhouse and use the dues collected there to finance their enterprise. If European powers were to satisfy their just claims they would have not only to seize customhouses but to hold them for a long time, which would result in "a definite and very possibly permanent occupation of Dominican territory." This would be contrary to the Monroe Doctrine; and yet the United States could not interfere to prevent it without "virtually saying to European governments that they would not be allowed to collect their claims." The only alternative consistent with dignity and honesty was to provide some other means of satisfaction, and that involved intervention in Dominican affairs. Recognition such as this argument contains of what may be called an international police jurisdiction in extreme cases is a necessary corollary of the strict enforcement of the Monroe Doctrine, and a condition of its general acceptance. Those who profit by it "must accept certain responsibilities along with the rights it confers, and the same statement applies to those who uphold it."[1]

[The epoch-making Treaty signed at Washington in December, 1921 between the United States, Great Britain, France, and Japan is considered elsewhere.[2] Here it is enough to observe that it provides for the settlement by conference of disputes arising between the signatory powers as to their insular dominions in the Pacific; and that, far from constituting any exception to the Monroe Doctrine, it fulfils one of the very purposes for which the doctrine was framed. For it tends to peace, commerce, and honest friendship with all nations" without in any way being an "entangling alliance."]

[1] Moore, *International Law Digest*, vol. VI, pp. 518–529.

[2] See § 221.

§ 116

The growth of this wholesome feeling that the Monroe Doctrine involves duties as well as powers and privileges has been accompanied by an attempt to organize a Pan-American polity in such a way that, though the United States may hold a position of leadership, it exercises no paramount authority. Some movement in this direction was necessary to prevent the division of the independent states of the American continents into a Latin-American group on the one hand and on the other the United States in a position of isolation. In the earlier part of the last century the states of South and Central America received the Monroe Doctrine with joy. They were disposed to take the ground that it amounted to a pledge of support from the United States to the other American republics in excluding European interference from the political complications of the American continents and preventing any European state from acquiring by colonization further dominion in the New World. They therefore proposed a Congress at Panama in 1826 for the discussion of matters of common interest. When the Congress met, the representatives of only four Latin-American states were present. It adjourned before the delegates of the United States reached their destination, and never reassembled. What its promoters desired was an alliance for mutual support in case of any attempt on the part of European powers to contravene the Monroe Doctrine as they interpreted it; whereas the United States declined to tie its hands by treaty-pledges, and was determined to preserve its freedom of action in any emergency that might arise. The consequences of this failure were far-reaching. Politically the Latin-American states were glad to seek in their weakness the support of their powerful northern neighbor. But commercially they entered into relations with Europe, and in the realm of ideas they were almost exclusively dominated by European influences.[1] After a time the more powerful among them began to feel distrust of the United States. They resented its claim to hegemony

The Pan-American movement.

[1] Moore, *International Law Digest,* vol. VI, pp. 416–420.

in the New World; and as their need of its support diminished, their jealousy of its authority increased. The extent of this change of attitude varied from time to time and from state to state. But by the end of the last century it had grown sufficiently pronounced and sufficiently general to cause uneasiness at Washington. Hence the attempt to organize a Pan-American movement in which all the independent states of the New World should take part.

This new and important development of transatlantic affairs began with the negotiations that led to the assembly of the first International American Congress at Washington on the invitation of the United States. It sat from October, 1889, to April, 1890, and led to the establishment of an International Bureau of Information, which still exists and does valuable work. A plan of arbitration for the settlement of differences between American states was elaborated but never ratified, and a survey was recommended for an intercontinental railway to connect North and South America. In addition, various projects were discussed for monetary union, uniform extradition treaties, a uniform system of port dues, and other changes, for which, as events soon showed, opinion was by no means ripe. Six years afterwards an attempt to hold another meeting failed, and is not reckoned in the official nomenclature. The second International American Congress was held in the City of Mexico in 1901 and 1902. It was attended by representatives of all the American republics, and succeeded in doing much solid work. It secured the adhesion of all its member-states to the Hague Convention of 1899 for the pacific settlement of international disputes. Nine of the powers represented at it signed a treaty for what is called compulsory arbitration of all differences that do not affect their national independence or national honor, and seventeen joined in another treaty whereby they bound themselves to send before the Hague Tribunal all claims for pecuniary loss or damage. Resolutions were passed concerning other matters, such as the Pan-American Railway, quarantine, and commerce, and the International Information Bureau of the American Republics was reorganized. The third International American Congress,

held at Rio de Janeiro in the summer of 1906, proceeded on the same prudent lines, and showed its desire for peace and progress by passing a resolution recommending the nations represented therein to strive at the ensuing Hague Conference for a General Arbitration Convention. The chief work of the fourth Conference, which met at Buenos Aires in August, 1910, was to provide, under the name of the Pan-American Union, a permanent committee of the International American Conferences with wide executive and secretarial functions.[1] [Other Conferences were held in 1911 on commerce, in 1915–1916 on science, and in 1915 on finance.][2]

But this is not all. An indirect result of the negotiations and adjustments to which these conferences have given rise is that the United States shows a disposition to consult the more powerful and progressive Latin-American states in the solution of difficulties that arise from the misgovernment and irresponsible ambitions of some of the others. A remarkable instance of this new attitude occurred in 1907, when the direction and assistance of Mexico as well as the United States was given to the five Central American republics who strove to end an epoch of constant wars and revolutions by establishing a Central American Court of Justice, to which they bound themselves to submit all controversies which may arise between them such as diplomacy finds itself unable to settle. They also covenanted that none of them would recognize in the others any government that came into power as the result of a revolution, as long as it had not been legalized by the freely elected representatives of the people. Their agreement extended to many other matters and almost amounted to establishing a loose confederation.[3] The result has not fulfilled expectations; and Mexico, which joined the United States in the attempt to substitute order and justice for constant

[1] Moore, *International Law Digest*, vol. VI, pp. 599–604; *Supplement to the American Journal of International Law*, vol. I, pp. 299–308, and vol. V, pp. 1–37.

[2] [*American Journal of International Law*, vol. V, p. 754; X, p. 138; XI, p. 772; XIV, p. 343.]

[3] *Supplement to the American Journal of International Law*, vol. II, pp. 219–265.

strife, has since become the victim of successive revolutions. The creation of a joint hegemony of the leading states in the New World, analogous to the joint hegemony of the Great Powers of Europe, must be relegated to the domain of hope.

Prediction would be folly. All we can venture to say is that the old order founded on the doctrine of the equality of all independent states seems breaking up before our eyes, as three hundred years ago the mediaeval order crumbled beneath the gaze of the men of the Renaissance and the Reformation. For many of them it was not only time-honored but God-given. Yet we can see now that universal sovereignty was a human growth, not a divine institution. When the society of nations outgrew it, another order more suited to the new international life of the period had to take its place. Is there in that order a finality which its predecessor lacked? May not international society be organizing itself to-day on lines inconsistent with that absolute equality in all things which still seems to some statesmen and publicists almost a sacred dogma? That states must remain equal before the law in such matters as jurisdiction, proprietary rights, and diplomatic privileges is evident. But it seems almost as evident that they cannot remain equal in what we may term political rights and social standing, now that the society of nations has become self-conscious, and is preparing itself for the performance of legislative, administrative, and judicial functions.

## § 117

Matters of ceremony and etiquette connected with the doctrine of equality.

The principle of *equality*, with the limitations suggested in previous sections, pervades and influences the whole of International Law. But the definite rules that can be traced to it are few in number and not of first-rate importance. They relate to matters of ceremony and etiquette, which are the outward signs of equality or the reverse. The principle appears to demand that all independent states should be treated alike; but though this is possible in some matters, such as firing salutes or supplying guards of honor, it is im-

possible in others, such as the order of sitting at a state ceremonial or the order of signing an international document. To meet the difficulties occasioned by these instances and others of a similar kind, rules have been devised which reconcile the theoretical equality of states with the precedence which it is necessary should exist among sovereigns and their representatives. In the seventeenth and eighteenth centuries an exaggerated importance was attached to questions of etiquette. Readers of Macaulay's *History* will remember the graphic description given in Chapter XXII of the squabbles of the plenipotentiaries assembled at the Conference of Ryswick; and those who are desirous of acquiring further information on the subject will find what they want in Bernard's *Lectures on Diplomacy*. An amusing instance of the trivialities out of which disputes could grow is afforded by Sir John Finett's account of the marriage festivities of the Princess Elizabeth, daughter of James I of England, and Frederick, the Elector Palatine. The worthy knight was master of the ceremonies at the English Court, and evidently took himself and his official duties very seriously. We subjoin a short quotation from his *Observations touching Forren Ambassadors*, preserving the original spelling. He writes, "At this time the French and Venetian Ambassadors invited to the marriage were not free from Punctillios. That made an effort to precede the Prince. This stood upon it that they were not to sit at the table without Chaires (though the Prince. . . had but a stoole, the Count Palatine and the Princess, onely for the honour of the day having Chayres) and insisting upon a formality that the Carver was not to stand above him; but neither of them prevailed in their reasonless pretences." All ceremonial disputes, however, were not so fantastic or so easily settled as this one. Occasionally they led to bloodshed, and were the pretexts if not the actual causes of war, as when in 1672 Charles II of England commenced hostilities against the United Provinces, ostensibly because one of his royal yachts had not been properly saluted when passing through the Dutch fleet near the coast of Zealand.

§ 118

Rules of precedence of states and their representatives.

But it must not be supposed that etiquette is altogether unimportant, or that states in modern times have ceased to care for it, because they no longer go to war about such matters as titles and salutes. It is necessary for the dignified and orderly conduct of international affairs that ceremonies should exist and that rules of precedence should be laid down and accepted. Courtesy demands that states should abide by these rules in their mutual intercourse. The power that neglects them degrades itself in the society of nations to the level of a rude boor in the society of individuals. Moreover some of them are symbolic. The honor paid to the flag, for instance, when it is saluted by a foreign man-of-war entering a friendly port, is something more than a piece of etiquette. To omit the salute would imply that the state visited was inferior to other states that still received the customary honor; and therefore failure to fire the usual number of guns would be justly resented. But it is hardly likely that such a case will arise in future, and, if it does, we may safely say that the peace of nations will not be disturbed by it. Many of the old difficulties have been settled by express or tacit agreement, others have disappeared with lapse of time and changes of circumstances, and with regard to those that still remain, a disposition to compromise and to avoid elevating trifles into matters of supreme importance happily prevails.

We will give a brief sketch of existing arrangements, dealing first with

*Rules of precedence for states and their representatives.*

The relative rank of states and sovereigns has never been determined by general agreement. A fixed order of precedence is quite compatible with equality before the law; but, inasmuch as the pride of rulers is involved in questions concerning it, no such order has ever been accepted. The attempt that was made at the Congress of Vienna of 1815 to classify the states of Europe for ceremonial purposes failed entirely. Custom has, however, given birth to a few

rules. It used to be held that states which enjoyed royal honors took precedence of states which did not. But as the enjoyment of royal honors means little more than the right of sending diplomatic ministers of the first class, and that right is now accorded to all independent states, the distinction based upon it has become obsolete and unmeaning. The rules in existence now are as follows: (*a*) Fully sovereign states take precedence of states under the power of a suzerain. (*b*) Precedence is accorded to the Pope by Roman Catholic states, but not by Protestant states or by states which hold the faith of the Greek Church. (*c*) Sovereigns who are crowned heads take precedence of those who are not, such as Grand Dukes or Electors; but powerful republics, such as the United States and France, rank along with the great monarchical states. The old view that a republic was inferior to an empire or a kingdom has now but little influence; but two centuries ago it was enormously strong. The Dutch had great difficulty in making good their position at the Congress of Münster and on other occasions; and it required all the firmness of Cromwell to secure for the Commonwealth the ceremonial rank accorded to the old English monarchy.

When a great treaty or other international document has to be signed by several powers, various devices are resorted to for the purpose of preventing disputes as to precedence. The most famous of them is the *Alternat*, a usage whereby the signatures alternate in a regular order, or in one determined by lot, the name of the representative of each state standing first in the copy kept by that state. The plan generally adopted now is to sign in the alphabetical order of the names of the powers in the French language.

The relative rank of the regular diplomatic agents of states is determined by fixed rules that have received general assent and are acted upon by all civilized nations. We will discuss them when we deal with Diplomacy and Negotiation.[1]

[1] See § 123.

§ 119

We will now proceed to consider

*Titles and their recognition by other states.*

Every sovereign may take whatever title is conferred on him by the law of his own country; and his subjects are, of course, bound to use it in all official documents. But other states are under no international obligation to use a new title taken by the head of one of their number. They may decline to do so, and continue in their official intercourse the use of the old title, or they may use the new one only on conditions. The latter course is sometimes adopted if the new title is accounted higher than the old. It is then sometimes stipulated that the use of it should not be held to confer a higher degree of rank and precedence upon the sovereign who has assumed it. These arrangements are well illustrated by the history of the reception and acknowledgment abroad of the imperial title of the [now extinct] Czar of Russia. Peter the Great proclaimed himself Emperor of all the Russias in 1701. England was the only power that recognized the new title at once. Prussia did not acknowledge it till 1723, the German Empire till 1746, Spain till 1759, and Poland till 1764.[1] When France recognized it in 1745, she stipulated that it should make no change in the ceremonies formerly observed between the two courts.

Titles and their recognition by other states.

§ 120

The last matters we have to consider in connection with equality and its outward signs are

*Maritime ceremonials.*

These are salutes between ships or between ships and forts. They are carried on by firing artillery or striking sails. The law of each state prescribes their details as between its own vessels. As between vessels of different states, or between vessels of one state and forts and land batteries of another, matters are regulated by express

Maritime ceremonials.

[1] Halleck, *International Law* (Baker's ed.), vol. I, p. 117.

stipulations or by international custom. In the days when states claimed dominion over portions of the high seas and saluting first was looked upon as an acknowledgment of superiority, great disputes arose about them. British cruisers were instructed to capture vessels that refused to give proper honor to their flag in the seas claimed as part of the territorial possessions of the Crown.[1] Philip II of Spain forbade his vessels to salute first when they passed the cities and forts of other sovereigns. France and Russia, hopeless of overcoming difficulties, agreed by treaty in 1787 that in future there should be no salutes between their vessels either in port or on the high seas, and a similar Convention was negotiated in 1829 between Russia and Denmark.[2] In modern times saluting is regarded merely as an act of courtesy; and treaties and custom have given birth to a number of rules which meet with general acceptance. The chief of them are as follows: (*a*) A ship of war entering a foreign port or passing a fort salutes first, unless the sovereign or his ambassador is on board, in which case the port or fort salutes first. In any case the salute, which is held to be an honor paid to the national flag, is returned gun for gun, by a fort if there is one in the place, if not by a ship of war. (*b*) When public vessels of different nationalities meet, the ship or squadron commanded by the officer inferior in rank salutes first, and the salute is returned gun for gun. (*c*) No international salutes are to exceed twenty-one guns. (*d*) Merchant vessels salute ships of war by lowering the topsails, if they have no guns on board. Sometimes the flag is lowered, but this is regarded by most states as derogatory to their dignity.[3]

[1] Walker, *Science of International Law*, pp. 167–171.

[2] D'Hauterive and De Cussy, *Recueil des Traites*, part I, vol. III, p. 252, and part II, vol. II, p. 70

[3] Perels, *Seerecht*, pp. 139–143.

# CHAPTER V

## RIGHTS AND OBLIGATIONS CONNECTED WITH DIPLOMACY

### § 121

Diplomatic intercourse necessary. Growth of resident embassies.

The affairs of nations could not be conducted without mutual intercourse. Every state, however barbarous, recognizes this, and even savage tribes respect the persons of heralds and envoys. But among the family of civilized nations who are subjects of International Law intercourse is carried on to a great and steadily increasing extent; and with its growth has grown a system of regulating it by special formalities, employing special agents to carry it on, and granting them special immunities.

In the Middle Ages when the intercourse between peoples was comparatively meagre, negotiations were only occasional incidents in the life of a state. They were carried on by envoys, sent abroad to do the special business on hand and expected to return as soon as it was finished. The service was often one of difficulty and danger, for though the persons of ambassadors were held sacred in the country to which they were sent, they received little protection in the states they passed through on the way. There were plenty of robber bands for them to guard against and plenty of physical obstacles for them to overcome.[1] The revival of commerce and letters at the time of the Renaissance, and the immense impetus given to human activity by the discovery of the New World, made intercourse between states more common and more necessary than before. But the introduction of the practice of sending permanent ambassadors to reside at foreign courts is due more to statecraft than to utility. It began in the fourteenth century among the great Italian republics; but

[1] Bernard, *Lectures on Diplomacy*, pp. 121, 122.

Louis XI of France, who reigned from 1461 to 1483, is said to have been the first sovereign in western Europe to resort to it, his design being to have a sort of chartered spy at the court of each of his powerful neighbors. After a time the convenience of the practice secured its general adoption, and by the middle of the seventeenth century it had become recognized as the regular method of carrying on diplomatic intercourse. But it had to win its way against a mass of jealousy and suspicion, caused largely by the unscrupulous character of the early diplomatists. "If they lie to you, lie still more to them," said Louis XI to his ambassadors.[1] "An ambassador," said Sir Henry Wotton in a punning epigram, "is a person who is sent to lie abroad for the benefit of his country." Henry VII of England is praised by Coke as a "wise and politique King" because he would not suffer ambassadors from other states to remain at his court after their immediate business was finished;[2] and as late as 1660 threats were uttered in the Polish Diet that the French ambassadors would be treated as spies if they did not return home.[3] But the new system became a necessity as the complexity of international affairs increased in the seventeenth century; and in spite of the unfavorable opinion of Grotius [4] who says that resident embassies may be excluded by states, and speaks of them as "now common but not necessary," it grew and prospered, and many and various observances grew up with it and were gradually embodied in International Law.

§ 122

Development of different kinds of diplomatic ministers.

At first diplomatic ministers were of one kind, and were usually called *ambassadors* and were supposed to represent the person as well as the affairs of their sovereign. Louis XI of France introduced the custom of sending persons of an inferior sort, termed *agents* to transact his affairs without representing his person. His diplomacy frequently worked in secret.

[1] Flassan, *Diplomatie Française*, vol. I, p. 247.
[2] *Fourth Institute*, ch. XXVI.
[3] Ward, *History of the Law of Nations*, vol. II, p. 484.
[4] *De Jure Belli ac Pacis*, bk. II, ch. xviii, iii.

He sometimes sent his barber on an occult mission, and it is obvious that his purpose would have been defeated by an exhibition of state ceremonial.

Thus matters stood at the beginning of the seventeenth century, when permanent legations became common. Soon after we find the agent disappearing from the ranks of diplomatic ministers, and becoming merely a person appointed by a prince to manage his private business at a foreign court. But the distinction between the representative of his sovereign's person and the representative of his sovereign's affairs continued to be made. The first was called an ambassador, the second an *envoy* or an *envoy extraordinary*. Below the envoy in rank came at the beginning of the eighteenth century a third class called *residents*. Vattel says of them that their "representation is in reality of the same nature as that of the envoy,"[1] but custom undoubtedly ranked them below the second order of diplomatic ministers. Sometimes they had no letters of credence, and in that case their mission must have been of a semi-private character. To these three orders of diplomatic agents was added in the eighteenth century a fourth, that of *ministers*. According to Vattel, this was done to avoid the constant disputes about precedence which seem to have taken up no small portion of the time and energy of the diplomatists of the seventeenth and eighteenth centuries. He says, "The minister represents his master in a vague and indetermined manner, which cannot be equal to the first degree, and consequently makes no difficulty in yielding to an ambassador. He is entitled to all the regard due to a person of confidence to whom the sovereign commits the care of his affairs, and he has all the rights essential to the character of a public minister."[2] The very essence, then, of a minister was the indeterminate character of his position. He was "not subjected to any settled ceremony," and we cannot therefore rank him with the other kinds of diplomatic agents. The only thing absolutely fixed about him was that he came below an ambassador in order of precedence. Sometimes he was called *minister plenipoten-*

[1] *Droit des Gens*, bk. IV, § 73. [2] *Ibid.*, § 74.

*tiary*, a title which seems to have implied higher rank than that of simple minister.[1]

§ 123

Classification of diplomatic ministers.

The foregoing remarks point to the confusion that existed a hundred years ago as to the relative rank of diplomatic agents, and demonstrate clearly the need of some authoritative classification. At the Congress of Vienna in 1815 an attempt was made to establish by general consent a regular order of rank and precedence. The result was the establishment of the three following classes:—

(*a*) Ambassadors and Papal Legates or Nuncios. These represented the person and dignity of their sovereign as well as his affairs.

(*b*) Envoys, Ministers Plenipotentiary, and others accredited to sovereigns.

(*c*) Chargés d'Affaires, accredited not to sovereigns but, to Ministers of Foreign Affairs.[2]

This order, however, failed to reconcile every difference. It had been agreed that, while all the diplomatic agents belonging to a class should rank before any of the class below it, within a class precedence should be determined according to the length of the stay of each individual diplomatist at the court to which he was accredited. But in practice it was found that the Great Powers were unwilling to allow the envoys and ministers of minor states to take precedence of their representatives of the second class. Accordingly the Congress of Aix-la-Chapelle of 1818 created a class of *ministers resident accredited to sovereigns*, which it interpolated between the second and third of the classes agreed upon at Vienna.[3] The minor states could thus have ministers, and yet avoid making a claim to precedence for them over the ministers of the Great Powers. This device seems to have been successful. The order and rank of diplomatic agents is now settled by a general agreement to recognize the four

[1] C. de Martens, *Guide Diplomatique*, § 11.

[2] Hertslet, *Map of Europe by Treaty*, vol. I, pp. 62, 63. [3] *Ibid.*, p. 575.

classes above described, and to regulate precedence in each class by length of residence. Each state sends what kind of representative it pleases, the only restriction being the now obsolete one that none but states enjoying royal honors can send ambassadors. States agree as to the rank of their respective agents at one another's courts, and send to every neighbor a representative of the same class as the representative they receive from it. Thus when in 1893 the United States resolved for the first time in its history to employ diplomatic agents of the first class, it accredited ambassadors to Great Britain, France, and a few other great powers who were willing to raise their ministers at Washington to ambassadorial rank.

Ambassadors used to have a right to a solemn entry into the capital of the state to which they were sent. This took place at the beginning of their mission, and was made an occasion of great display. The ambassadors of other states joined in the procession and sometimes quarrelled for precedence. For instance, in 1661 an armed conflict took place on Tower Hill, London, between the retinues of the French and Spanish ambassadors, on account of the attempt of each to follow next to the king in the procession formed for the solemn entry of the representative of Sweden. In the course of the struggle a Spaniard hamstrung the horses of the French ambassador's coach, and thus enabled the Spanish coach to take the coveted place; but reparation was afterwards obtained by Louis XIV, who threatened war should it be refused.[1] The discontinuance of the practice of solemn entry renders such scenes impossible now. Ambassadors, as representing the person and dignity of their sovereign, are held to possess a right of having personal interviews, whenever they choose to demand them, with the sovereign of the state to which they are accredited. But modern practice grants such interviews on suitable occasions to all representatives of foreign powers, whatever may be their rank in the diplomatic hierarchy. Moreover, the privilege can have no particular value, because the verbal statements of a

[1] Ward, *History of the Law of Nations*, vol. II, pp. 458–462.

monarch are not state acts. Formal and binding international negotiations can be conducted only through the minister of foreign affairs.

§ 124

Sovereign states possess the right of legation fully; part-sovereign states possess it to a limited extent.

Every independent member of the family of nations possesses to the full the right of sending diplomatic ministers to other states; but it belongs to part-sovereign communities only in a limited form, the exact restrictions upon the diplomatic activity of each being determined by the instrument that defines its international position. In the case of the looser sort of confederations the treaty-making and negotiating power of the states that comprise them is limited by the federal pact. Thus each member of the German Confederation which existed from 1815 to 1866 was bound not to do anything in its alliances with foreign powers against the security of the Confederation or any member of it, and when war was declared by the Confederation no member of it could negotiate separately with the enemy.[1] [Representatives of the League of Nations and members of the Permanent Court of International Justice have diplomatic privileges.] Permanently neutralized states can make no diplomatic agreements that may lead them into hostilities for any other purpose than the defence of their own frontiers. Belgium, for instance, though in 1867 [being then a permanently neutralized state] she took part in the Conference of London, which decreed and guaranteed the neutralization of Luxemburg, did not sign the treaty of guarantee because it bound the signatory powers to defend the Duchy from wanton attack.

§ 125

It can hardly be said that states are under an obligation to send and receive diplomatic agents, but, as without them official international intercourse would be impossible, any important state that declined to make use of them would *ipso facto* put itself out of the family of nations and beyond the pale

[1] Wheaton, *International Law*, § 47.

of International Law. No civilized state is likely to wish to do this; and therefore we may assume with confidence that all such states will exercise their right of legation. But a state may for grave cause temporarily break off diplomatic intercourse with another state. Such an act is, however, a marked affront, and is, therefore, the sign of a rupture that only just falls short of war, and indeed may lead to it. For example, in January, 1793, Great Britain broke off diplomatic intercourse with France owing to the execution of Louis XVI on the 21st of that month, and ordered Chauvelin, the French ambassador, to leave the country. A few days later, on February the 8th, France commenced war.[1] When states have previously determined upon war, the withdrawal of the diplomatic representatives on both sides is an invariable preliminary or concomitant of the first acts of hostility. But unless such a resolve has been taken, it is possible that the displeasure shown by the cessation of diplomatic intercourse may pass over without a rupture of peaceful relations. This occurred in connection with Servia in 1903. After the assassination of King Alexander in June of that year, and the installation of some of his murderers in high political office, the Great Powers withdrew their ministers in order to mark their sense of the enormity of the crime. Great Britain did not resume diplomatic relations till June, 1906, by which time the murderers had been deprived of influence in the state, at least ostensibly. But no hostilities took place during the three years' interval. It is obvious, however, that this mode of showing displeasure is not suited to disagreements between two states of the first rank; for the amount of business requiring the attention of their representatives at the seat of each other's government is too great, and its nature too important, for it to be allowed to accumulate or remain undone with impunity.

The rupture of diplomatic relations is a serious step, which generally ends in war.

[1] Hammond, *Charles James Fox*, pp. 258, 259.

§ 126

Though the suspension of all intercourse is a sign of rupture, yet a state may without offence refuse to receive a particular individual as diplomatic representative from one of its neighbors, if it has good reason for objecting to him. The fact that he is personally obnoxious to the sovereign of the country to which it is proposed to send him is accepted as sufficient ground for a refusal. Thus France declined to receive the Duke of Buckingham as ambassador extraordinary from Charles I of England, because on a previous visit to the French Court he had posed as an ardent lover of the Queen.[1] But should the objection raised be deemed unreasonable, the government that proposed to send the representative is not bound to acquiesce in his rejection. A case of this kind occurred in 1885, when Austria declined to receive Mr. A. M. Keiley as minister of the United States, on the ground that his wife was a Jewess and that he was married to her by civil contract only. President Cleveland declined to cancel his appointment, and on his resignation made no new nomination, but intrusted the interests of America at Vienna to the secretary of legation acting as chargé d'affaires *ad interim*.[2]

But a state may without offense refuse on good grounds to receive a particular individual, or ask for his recall.

Another reason for rejecting a diplomatic representative is public and pronounced hostility on his part to the people or institutions of the country to which he is accredited. The same Mr. Keiley who was rejected by the government of Austria-Hungary had previously been refused for much better reasons by the Italian kingdom. He had spoken at a public meeting against the destruction of the temporal power of the Pope; and as its overthrow was effected by the arms of Italy, and in consequence relations of pronounced bitterness existed between the Papacy and the Italian Government, it was hardly to be supposed that his mission could be conducted in an acceptable manner.[3] This case, like the other

[1] Gardiner, *England under the Duke of Buckingham and Charles I*, vol. I, pp. 182, 183, 329.

[2] Moore, *International Law Digest*, vol. IV, pp. 481–484.

[3] *Ibid.*, p. 480.

that occurred concerning the same candidate for diplomatic honors, shows the wisdom of the custom that the appointing state should inquire beforehand whether the person it proposes to send is acceptable to the government to which it is proposed to send him. The United States now follows this practice with regard to ambassadors.

If a proposed representative is one of the subjects of the state to which he is sent, it may decline to receive him on the ground that the immunities of an ambassador are incompatible with the duties of a citizen. But, should he be received, full diplomatic privileges must be accorded to him. His country can refuse him, or accept him on conditions if such conditions are agreed to by the power that sent him, but having once received him unconditionally, it is not at liberty to exercise any authority over him on the ground that he is a subject and therefore amenable to its law. This point was raised in the case of Sir Halliday Macartney, a British subject who acted as secretary to the Chinese legation in London. An attempt was made in 1890 to compel him to pay local rates on the house that he occupied; but it was decided that the claim should not be sustained, since he had been received without conditions in his diplomatic capacity and was therefore entitled to full diplomatic immunities.[1]

Just as a state may without offence decline to receive any particular person as the diplomatic representative of another state, if it has reasonable grounds for its refusal, so it may demand the recall of a resident ambassador or other agent who has made himself obnoxious to the government of the country or the head of the state. Such a request is granted, if there is good reason for it, and if the ambassador's country desires to remain on friendly terms with the country that demands his recall; but the better opinion appears to be that it is under no obligation to recall merely because it is informed that the other government desires to be rid of the individual in question.[2] It has a right to ask for reasons and to judge of them; and though, if it deems them

[1] *Macartney* v. *Garbutt*. L. R. 24 Q. B. D. 368.

[2] Message of President Harrison, Jan. 25, 1892.

inadequate, it cannot compel the authorities of the other state concerned to carry on diplomatic business with the agent whose conduct is impugned, it may decline to order him home, and may mark its sense of his dismissal by leaving the embassy for a time in charge of an inferior member of its diplomatic service. The early history of the United States affords an instance of recall of a diplomatic minister on a demand caused by the most persistent and outrageous provocation. M. Genêt, the minister of the French Republic, openly violated the neutrality of the United States in the war between England and revolutionary France. He even attempted to set up French prize courts within American jurisdiction; and, instead of heeding the remonstrances addressed to him by the administration of Washington, endeavored to stir up popular feeling against the President and his cabinet. At last a request was made for his recall; and the French Government not only acceded to it in 1794, but asked that he and his agents might be sent home under arrest, an extreme step which Washington very wisely declined to take.[1] In a much more recent case dismissal was added to the demand for recall. In the course of the presidential campaign of 1888 Lord Sackville, the British minister at Washington, received a communication purporting to come from a Mr. Murchison, a naturalized American citizen of British birth resident in California. The letter asked information from him as to the friendliness of the existing administration towards Great Britain, and intimated that the vote of the writer depended upon the reply, which should "be treated as entirely secret." Lord Sackville answered, in a communication marked "Private," that it was impossible to predict the course that Mr. Cleveland would take towards Great Britain if he were reëlected, but that in the writer's belief the party in power was desirous of maintaining friendly relations with the mother country. The letter of inquiry turned out to be a trick concocted for election purposes. It was published along with Lord Sackville's reply and distributed broadcast as a campaign document by the party opposed to the Cleveland administration.

[1] Moore, *International Law Digest*, vol. IV, pp. 485–488.

In these circumstances his recall was demanded by telegraph on the 27th of October. His government felt unable to come to a decision till it had been placed in possession of the allegations against him and the evidence on which they were founded; but without further delay he was dismissed and his passport sent to him on the 30th of October. The British minister acted with an absence of discretion remarkable in an experienced diplomatist. But he was deceived by a dishonorable artifice; and it did not become the country where the consideration due to a foreign representative had been so strangely neglected to hurry him out of its territory before his own government had an opportunity of examining the evidence against him. Moreover, a new terror will be added to official life, if the case is to be taken as a precedent for surrounding private communications with the caution hitherto reserved for public statements.[1] [The great war afforded some examples of requests for the recall of diplomatic agents, who had abused their position in the neutral state to which they were accredited. The most conspicuous of these cases was that of Dr. Dumba, the Austro-Hungarian ambassador to the United States of America. In 1915, he was detected in making proposals to his government of plans for instigating strikes in American factories engaged in the production of munitions of war, and in employing an American citizen protected by an American passport as a secret bearer of official despatches through the lines of the enemy of Austria-Hungary. The United States government protested against this "flagrant violation of diplomatic propriety" and notified the Austrian government that Dr. Dumba was no longer acceptable as an ambassador. He was recalled accordingly.][2]

## § 127

Certain formal observances have grown up with regard to the reception and departure of diplomatic ministers.

[1] British State Papers, *United States*. Nos. 3 and 4 (1888); Moore, *International Law Digest*, vol. IV, pp. 536–548.

[2] [*American Journal of International Law*, vol. IX, p. 935. For other examples, see Oppenheim, *International Law*, vol. I, § 409.]

They receive from their own governments various documents, which confer on them their official character, and give them information as to the questions with which they are expected to deal and the methods to be followed in negotiating. First and most important among these documents is the *letter of credence*. It sets forth the name of the diplomatic agent and the general object of his mission, and requests that he may be received with favor and have full credit given to what he says on behalf of his country. It is generally addressed by the sovereign who sends to the sovereign who receives the minister; but in the case of a chargé d'affaires it is written by foreign minister to foreign minister; and when the head of a state is a temporary president or other elected officer, letters of credence are addressed not to him, but to the state of which he is for the time being the chief ruler.[1] Power to act generally on behalf of his country is granted by the letter of credence a diplomatist takes with him to the court where he is to reside. But agents charged with special business receive a document called their *full powers*, which is signed by the sovereign whom they represent and countersigned by his minister for foreign affairs. The most common of these documents are the *general full powers*, which give authority to their possessor to negotiate with each and all the states represented at some congress or conference. They are generally delivered to the presiding plenipotentiary at the first sitting of the conference, or exchanged and verified by the diplomatists present, who, not being accredited to a sovereign or his foreign minister, require no letters of credence. A duly accredited diplomatic agent carries with him, in addition to his *letter of credence* or his *full powers*, a *passport* which authorizes him to travel, and describes his person and office. In time of peace it is a sufficient protection to him on his journey to the court to which he is sent; but in time of war an ambassador sent to the enemy's government requires a passport or safe-conduct from it. No minister starts on his mission without his *instructions*. These are directions given to a diplomatic agent for his guidance

Commencement and termination of diplomatic missions, and the ceremonies connected therewith.

[1] Despagnet, *Droit International Public*, § 227.

in the negotiations he is sent to conduct. They may be oral, but they are almost invariably written. He is not to communicate them to the government to which he is accredited, or to his fellow plenipotentiaries at a conference, unless specially authorized to do so. If points arise on which he is without instructions, or on which he deems it expedient to deviate from his instructions, he must refer to his government for directions. This is called accepting a proposal *ad referendum;* and it is frequently resorted to now that the telegraph and steam have made communication between a government and its agents at a distance rapid and easy.[1]

When a diplomatic minister reaches the capital of the country to which he is accredited, he notifies his arrival to the minister for foreign affairs, and demands an audience of the sovereign for the purpose of delivering his letters of credence. Ambassadors are entitled to a public audience, whereas ministers of the second and third classes have only a right to a private audience, and chargés d'affaires are obliged to be content with an audience of the foreign minister. The public audience is more ceremonious than the private audience, but at both the letters of credence are delivered to the sovereign, and formal speeches of good will and welcome are made to one another by the two parties to the interview.[2] When the diplomatic agent has gone through this ceremony all the rights and immunities of public ministers attach to him and continue till the end of his mission. Previously they are his rather by courtesy than of right, with the exception of personal inviolability, which he possesses from the moment he sets out to fulfil his mission. On the departure of a minister he has a similar formal audience to present his *letters of recall.* It was once a custom to give presents to departing diplomatists; and during the seventeenth century a good deal of energy seems to have been spent in quarrels about them; for if the representative of one sovereign imagined that what he had received was of

[1] Twiss, *Law of Nations*, vol. I, §§ 212–214; C. de Martens, *Guide Diplomatique*, ch. IV.

[2] Twiss, *Law of Nations*, vol. I, § 215.

less value than what had been given to the representative of another sovereign, he deemed his master insulted and made the court ring with his complaints. Some powers, the United States being one of them, have forbidden their diplomatic agents to receive these formal and official parting gifts, and they have now fallen into disuse.

There are numerous ways in which a diplomatic mission can be terminated. It comes to an end by the outbreak of war between the state that sends the minister and the state to which he is sent, or by his death or recall, or by the expiration of the time fixed for the duration of the mission, or by the success or failure of its special purpose, or by the return of the regular minister to his post in cases where a minister has been accredited *ad interim*. The death of the sovereign to whom the diplomatic agent is accredited, or the death of his own sovereign, terminates the mission in the case of monarchical states; but the election of a new chief magistrate of a republic makes no difference in this respect. If a minister is sent away in consequence of having given grave offence, or if he goes away in consequence of having received grave offence, whether offered to himself personally or to the state that he represents, his mission is in both cases brought to an end. Moreover, it is technically terminated by a change in his diplomatic rank; but in such a case he presents at the same time his letters of recall in his old capacity and his letters of credence in his new capacity, and thus commences a new official life at the moment of the dissolution of his former one. Strictly speaking, the death of a diplomatic minister terminates all the immunities enjoyed by those dependent on him; but kindness and courtesy demand that they be continued for a limited time to his widow and children, in order to give them the means of winding up his affairs and removing from the country.[1] [Even after his mission terminates, a diplomatic agent retains his privileges whilst he is travelling home, and there can be no excuse for the gross indignities to the French and Russian ambas-

[1] C. de Martens, *Guide Diplomatique*, ch. IX; Oppenheim, *International Law*, vol. I, §§ 404–417.

sadors which were allowed or connived at by the German government at the outbreak of the great war in 1914. M. Jules Cambon, the French ambassador, was conducted to the German frontier more like a suspected spy than a diplomatic agent; and when the United States of America entered the war, in 1917, its ambassador, Mr. Gerard, was not only temporarily confined as if he were a hostage, but an attempt was made by an official of the German foreign office to induce him during this confinement to cable for his government's authority to the revision of a treaty between it and Germany. On the other hand while the persons of the Austrian and German diplomatic representatives were respected in all the enemy states to which they had been accredited, it was alleged by the Germans that their embassy at Petrograd was completely wrecked by Russian mob violence. If this were the fact, it was only one degree less reprehensible than maltreatment of the ambassador himself would have been.][1]

## § 128

Diplomatic immunities—their general nature and the reason for their existence.

We have already indicated that diplomatic ministers resident at foreign courts possess many immunities. Speaking generally, we may say that they and their suites are exempt from the local jurisdiction. A good deal of doubt exists as to the exact limits of their exemption; but the reason for its existence is clear. An ambassador could not attend to the interests of his country with perfect freedom and absolute fearlessness, if he were liable to be dealt with by the local law and subjected to the authority of the officers of the state to which he was sent. In considering the nature and extent of diplomatic privileges it will be convenient to divide them into *Immunities connected with the person*, and *Immunities connected with property*, and to consider each class separately, though the line of demarcation between them is not always easy to draw.

[1] [Garner, *International Law and the World War*, vol. I, §§ 27–33. Fauchille, *Droit International Public*, vol. II, § 1048.]

§ 129

Immunities connected with the person of the diplomatic agent.

*Immunities connected with the person* are granted in the fullest degree to public ministers and those of their suite who possess the diplomatic character and therefore hold a privileged position in their own right, and in a lesser measure to the minister's wife, children, private secretary, chaplain and servants, who are necessary for his comfort and convenience, but do not belong to the diplomatic service of his country. With regard to all matters settled by the *lex domicilli*, the legal position of diplomatic agents resident abroad is that of persons resident in their own country. As to their private rights and obligations, they are subject to the law of the state that sends them; and all children born to them abroad are held to be subjects of their own country. They cannot be arrested unless they are actually engaged in plotting against the security of the state to which they are accredited, and even in such an extremity application for their recall should first be made unless the matter is too urgent for delay. This view of the law is upheld by the case of Count Gyllenborg, which occurred in 1717. He was Swedish ambassador to England, and while acting in that capacity had made himself one of the prime agents in a conspiracy to overthrow George I and set the old Pretender on the English throne. The courts of Sweden and Spain were concerned in the plot along with the English Jacobites and one of its leading features was the invasion of Scotland by 12,000 Swedish troops. The British Government obtained a clue to the conspiracy by intercepting some letters. They therefore arrested Gyllenborg and seized his diplomatic documents, in which they found full proof of all they had suspected. In consequence they detained the Count as a prisoner, till he was exchanged for the English ambassador to Sweden, who had been arrested in retaliation. The ministers of foreign powers in London protested against Gyllenborg's arrest as a breach of International Law; but when the reasons for it were explained to them, all except the Spanish ambassador professed themselves satisfied; and, as Spain was one of the

parties to the plot, its protests were of little value.[1] There can be no doubt that the British Government was right in the main and at the time, though in these days a minister in Gyllenborg's position would merely be escorted out of the country. His arrest would be regarded as going a little beyond the absolute necessities of self-defence, which alone can justify the exercise of personal restraint even in the milder form. In the very next year the French Regent ordered the arrest of the Prince of Cellamare, the Spanish ambassador at Paris, who had been engaged in a conspiracy to seize the Duke of Orleans and proclaim the King of Spain regent of France in his stead, with the Duke of Maine as deputy.[2] On this occasion no protests were made by third powers; and the two cases together may be held to have conclusively established the doctrine that a foreign minister's inviolability does not extend to cover acts done against the safety of the government to which he is accredited. It must, however, be remembered that he may not be tried and punished by the offended state. It has no jurisdiction over him; and its right to deal forcibly with him at all is based upon and limited by considerations of safety.

Visitors and hangers-on of the embassy do not possess the privilege of personal inviolability, but come under the jurisdiction of the state in whose territory they are. This was settled by a case that arose in 1653. In that year Don Pantaleon Sà, the brother of the Portuguese ambassador in England committed murder under circumstances of peculiar atrocity. He got into a quarrel at the London Exchange with Colonel Gerhard, and set upon him with a band of attendants. The Colonel was, however, rescued; but the next night Sà came to the Exchange with fifty armed Portuguese, and commenced a general attack on all who were there, one man being killed and several wounded before the horse guards came and put down the riot. The ambassador gave up the delinquents, but Don Pantaleon declared that

[1] Ward, *History of the Law of Nations*, vol. II, pp. 548–550; C. de Martens, *Causes Célèbres*, vol. I, pp. 75–138.

[2] C. de Martens, *Causes Célèbres*, vol. I, pp. 139–173.

he was clothed with the diplomatic character, and claimed to be under no jurisdiction but that of the king of Portugal. It was, however, shown that he was not an ambassador at the time, but had only received from his sovereign a promise that he should be accredited as ambassador on the recall of his brother, which was momentarily expected. His brother, the real ambassador, interceded for him; but Cromwell allowed the law to take its course, and he was tried, convicted and hanged.[1] His real position seems to have been somewhat doubtful. He certainly was not the head of the Portuguese legation, and therefore Hale is mistaken in supposing that his case supports the contention that an ambassador may be tried for murder.[2] If he is to be regarded as a member of his brother's suite, all we can say is that International Law has developed since his time and would not now permit a trial and execution under similar circumstances by the authorities of the state where the crime was committed. [At least this would be the rule according to British practice, if the person concerned were on the Foreign Office list.] But if he was simply a visitor at the embassy, he would not be protected by diplomatic immunity to-day any more than he was over two hundred and fifty years ago.

A public minister is free from legal process as well as from personal restraint. He cannot be compelled to appear in court and plead; but if he chooses to waive his privilege, the courts will deal with him either as plaintiff or defendant. Having submitted himself to their jurisdiction, he is bound to go through all that is needful to the due conduct of the case.[3] He cannot, for instance, refuse to answer awkward questions in cross-examination on the plea of diplomatic immunity. The question whether he may waive his privileges himself, or whether his government is alone competent to do so, is one to be decided, not by International Law, but by the law of each separate state for its own diplomatic

[1] Ward, *History of the Law of Nations*, vol. II, pp. 535–546.

[2] Hale, *Pleas of the Crown*, vol. I, p. 99.

[3] [*Taylor* v. *Best* (1854) 14 C. B. 487; followed in *Suarez* v. *Suarez*. L. R. [1918] 1 Ch. 176.]

agents. If the evidence of the minister of a foreign power is required in an important case, he must be requested to appear and give it; but he cannot be compelled to do so. Rather than defeat the ends of justice, ambassadors will generally consent to waive their immunity and give the required testimony. But in 1856 the Dutch minister at Washington, who was an essential witness in a case of murder, refused to appear in open court, though he was willing to make a deposition on oath. His government declined to order him to give evidence publicly, and the United States demanded his recall in consequence; but they could not force him to appear and testify.[1] At the trial of Guiteau for the assassination of President Garfield, the minister of Venezuela appeared as a witness and gave his testimony in open court.[2]

When permanent legations were first established by states at one another's courts, many extreme pretensions were put forward by ambassadors, and among them was the claim to exercise civil and criminal jurisdiction over the members of their suites according to the laws of their own country. But in modern practice no such right is conceded, and it would not now be demanded. In civil matters the utmost a diplomatic minister can do is to authenticate testaments and contracts made before him by members of his suite; and his chaplain may solemnize marriages between subjects of the state that has accredited him in the chapel of the embassy, if the laws of their country allow it; but there is great doubt and great diversity of practice with regard to the marriages of foreigners, or marriages between a subject of the ambassador's state and a foreigner.[3] In criminal matters that arise between members of the suite, the head of the legation takes and prepares the evidence, but sends the accused home for trial; and he possesses a similar power as to the servants of the embassy, though its limits are uncertain and disputable.

There has been, and still is, some difference of opinion among jurists as to whether a diplomatic agent, travelling

[1] Wheaton, *International Law* (Lawrence's ed.), pp. 393, 394.
[2] Wharton, *International Law of the United States*, § 98.
[3] Hall, *International Law*, 7th ed., § 53.

to his destination through the territories of third powers at peace with his sovereign, is entitled within them to full personal inviolability, or whether he can expect only the protection given to an ordinary traveller. Probably as a matter of strict right the latter is all that can be demanded; but the comity of nations would dictate the recognition of the ambassadorial character, and the protection of the foreigner clothed with it from all molestation on his passage through the territory to his proper destination, though it may well be doubted whether immunity should be granted to him if he made a stay of considerable length in the country. A belligerent can, of course, capture his enemy's ambassadors in any place where it is lawful for him to carry on hostilities, unless he has himself provided them with a safe-conduct. [The great war furnished examples both of the rule and of the exception. Thus the secretary to the German embassy in Spain, whilst travelling from there to Mexico in 1917, touched at Havana, and was captured by the authorities of Cuba, which was then at war with Germany. On the other hand, Dr. Dumba, whose recall has been already referred to,[1] secured in 1915 a safe-conduct from Great Britain, which exempted him from seizure during his homeward voyage to Austria.][2] It seems to be settled that commissioners appointed in accordance with treaty stipulations for special purposes, such as the marking out of a frontier or the superintendence of a military evacuation, have no right to diplomatic immunities. A British commissioner appointed under the treaty of 1794 was tried for an offence against the local law by an American court at Philadelphia, and the English Government made no complaints.[3]

The immunities of the members of a diplomatic minister's family and household are granted to them because his comfort and dignity could not be properly provided for unless they were free to a great extent from the local jurisdiction. His wife not only shares his personal inviolability, but is

[1] See § 126.

[2] [Oppenheim, *International Law*, vol. I, § 398. Hall, *International Law*, 7th ed., p. 584 *n.*]

[3] Wharton, *International Law of the United States*, § 93 *a*.

also a partaker of the ceremonial honors paid to him. His children occupy a similar position. [A modern instance of this occurred in 1906, when M. Carlos Waddington, son of the Chilian chargé d'affaires in Belgium, killed the secretary of the legation in Brussels, and then took refuge in the official residence of his father. After obtaining the assent of the Chilian government, the father waived his privilege, and M. Waddington was arrested, prosecuted, and acquitted by the Belgian authorities, a course of action which presumably would have been an infraction of privilege if the latter had not been expressly disclaimed.][1] The minister's chaplain and private secretary are certainly free from arrest, as also are the messengers and couriers attached to the embassy. It is generally held that the regular servants of the minister, as distinct from such persons as workmen temporarily employed about the premises, or individuals who give up but a small portion of their time to their duties in connection with the embassy, are exempt from the local jurisdiction. But there is no uniform practice as to the extent of their immunities, nor is there any agreement among the general body of civilized states as to what their privileges ought to be.[2] The law of England on the subject, as embodied in a statute[3] that is always held by British judges to be declaratory of the law of nations, declares void all writs and processes issued against them, unless they are traders. But in criminal matters the British authorities claim a right to exercise jurisdiction over the servants of the embassy, if the offence is committed outside the minister's residence. In most countries they would not be arrested without the special permission of the ambassador; and in modern times difficulties are generally prevented by the exercise of tact and judgment. If the servant of a public minister commits a criminal offence, his master either dismisses him from his service, and thus puts an end at once to all claim for immunity, or hands him over to

[1] [*Revue Générale de Droit International Public* (1907) vol. XIV, pp. 159–165.]

[2] For the ideas of jurists as to diplomatic immunities, see *Annuaire de l'Institut de Droit International*, vol. 14, pp. 240–244.

[3] 7 Anne, c. 12.

the local authorities to be dealt with according to their law. Only when the offence is serious, and is committed within the residence of the minister, does he, as a rule, arrest the perpetrator and send him home for trial. In civil cases he grants permission for his servants to be proceeded against in the local courts. In order to avoid misunderstandings and controversies as to the persons entitled to immunity, most states require the heads of the foreign legations to send periodically to the secretary for foreign affairs a list of the members of their suites and the servants in their employ.

§ 130

Immunities connected with the property of the diplomatic agent.

*Immunities connected with property* apply first and foremost to the official residence of the ambassador, usually called his *hotel*. It is generally regarded as inviolable except in cases of great extremity. The fiction of exterritoriality is sometimes applied to it, and it is held to be a portion of the state to which its occupant belongs. But the theory is a clumsy attempt to account for what is better explained without it. If it were true, the hotel could in no case be entered by the local authorities; whereas it is universally admitted that the extreme circumstances which justify the arrest of a diplomatic minister of a foreign power and the seizure of his papers, justify also forcible entry into his hotel and its search by the officers of the state to which he is sent. But the attack by Chinese troops and Boxers on the foreign embassies at Pekin in June and July, 1900, with the connivance of the Chinese Government if not under its direct orders, was an outrage for which no shadow of justification can be pleaded. It was justly followed by stern retribution, and the exaction of pecuniary indemnities. It must, however, be admitted that the excesses of some of the troops sent out by the great civilized powers to be the instruments of avenging justice were as reprehensible as the original offence. [In 1916, the Italian government confiscated the official residence in Venice of the Austrian envoy to the Pope. The envoy had left Italy in 1915 on the outbreak of war between Austria and Italy. The sei-

zure was justified on the ground of reprisal for the Austrian aerial bombardment of Venice. The matter was complicated by the peculiar position of the Papacy in International Law,[1] but it seems to have been a case in which the Pope's modified "right of legation" was necessarily subordinate to Italy's belligerent rights.][2]

It is now settled that in European countries ambassadors do not possess a right of giving asylum in their residences to criminals and refugees, though in the eighteenth century they were disposed to claim it. There appears, however, to be a binding custom in favor of harboring political refugees in the South and Central American states, and in Oriental countries. The frequent revolutions in the former group of states, and the barbarous treatment of political offenders in the latter, are held to justify a departure from the ordinary rule. The reception of Balmacedist refugees by Mr. Egan, the United States minister, in the course of the Chilian revolution of 1891, is a case in point, though there can be little doubt that he attempted to extend the right of asylum further than established usage warranted when he demanded safe-conducts for political refugees sheltered in his abode.[3]

Some states do not recognize the immunities of the ambassador's residence as existing to the extent usually claimed. France holds that the privileges of the hotel do not extend to acts done within it affecting the inhabitants of the country in which it is situated.[4] Great Britain claims the right of arresting servants of the embassy within the precincts of the hotel. This was clearly shown by a case that occurred in 1827, when the coachman of Mr. Gallatin, the American minister in London, was arrested in his stable by the local authorities on a charge of assault committed outside the embassy. The attention of the British Foreign Office was called informally to the subject; and in reply it was asserted that the law did not extend "to protect mere servants of ambassadors from arrest

[1] [See § 43.]

[2] [*Revue Générale de Droit International*, vol. xxiv, pp. 244–255.]

[3] Moore, *International Law Digest*, vol. ii, pp. 791–800.

[4] Hall, *International Law*, 7th ed., § 52.

upon criminal charges," and that the premises occupied by a diplomatic minister were not entitled to inviolability. The magistrates who issued the warrant were, however, told that they ought to have informed the minister of what they had done, in order that his convenience might have been consulted as to the time and manner of making the arrest.[1] The attitude of France and Great Britain in this matter is rather an exception to the general practice of states than an example of the enforcement of an ordinary rule. But it must be admitted that the exact limits of the inviolability of the hotel are ill-defined. The ambassador is free from the payment of taxes levied upon it, whether for purposes of state or for the maintenance of municipal government; but if the charge for such commodities as light and water takes the form of local taxation, he would be expected to meet the demands for them, just as he is expected to pay the bills for the provisions consumed by his household, though he cannot be compelled to do so, since his person is inviolate and his house and goods are exempt from legal process. The other official property of the embassy shares the immunities of the hotel. It may not be seized, distrained upon, or dealt with in any way, except in extreme coses of state necessity.

Among the privileges covered by the principle of the general inviolability of the official residence of the legation, one of the most important is the celebration of divine worship within it in the form desired by the ambassador, even though it is proscribed by the country in which he resides. But he may not give public notification of the services by ringing a bell or in any other way, nor may he allow subjects of the country to which he is accredited to be present, if attendance at such worship is forbidden by their law.

Some writers[2] hold that diplomatic ministers are liable to suits in the local tribunals, and other processes under the law of the country to which they are accredited, in all cases in which their private property in that country is concerned.

[1] Moore, *International Law Digest*, vol. IV, pp. 656, 657.

[2] For example, Woolsey, *International Law*, § 92 *e*; Calvo, *Droit International*, § 1528; Oppenheim, *International Law*, vol. I, § 391.

Their transactions as traders, executors, trustees, or indeed in any capacity but their official one, are held to render them amenable to the local jurisdiction as far as those transactions are concerned. It is, of course, admitted that the person of a diplomatic agent is inviolable; and therefore the doctrine amounts to no more than an assertion that he must submit to proceedings directed against the property, in such cases as we have described. It may be doubted, however, how far this view is consistent with sound principle or borne out by practice. The law of the United States prohibits the service of writs upon the resident ministers of foreign states, and considers those who sue out or enforce processes against them as guilty of an indictable offence, even though ignorant of their diplomatic character.[1] In England not only are the persons of diplomatic ministers inviolable, but all writs and processes whereby "their goods and chattels may be distrained, seized or attacked" are "utterly null and void," and all concerned in obtaining such writs or processes are subject to severe punishment.[2] The law of other leading countries contains similar provisions; and though cases can be found in favor of drawing a distinction between the private and the official property of a public minister, they are not of recent date. In 1720 the envoy of the Duke of Holstein in Holland had all his goods, except such as were official in their nature, seized for debts contracted by him in the course of trade; but his treatment can hardly be quoted as a precedent to-day.[3] Dana forcibly points out[4] the inconvenience to a minister of being obliged to appear and litigate, lest judgment should go against him by default. The extension of diplomatic immunities to all property possessed by the agents of foreign countries does not leave those who might suffer in consequence of it absolutely helpless. Most states now forbid their representatives abroad to engage in trade, and as to other matters, the remedy by diplomatic complaint, or an appeal to the courts of the ambassador's own country, will generally be sufficient.

[1] Wharton, *International Law of the United States*, § 93. [2] 7 Anne, c. 12.
[3] Bynkershoek, *De Foro Legatorum*, ch. xvi.
[4] Note to Wheaton's *International Law*, p. 307.

Goods sent from abroad for the use of an embassy are generally admitted duty free. But the privilege is granted rather as a matter of comity than of right. Precautions may be taken against the abuse of it, and on proof that it has been used to cover a contraband trade, it may be withdrawn.

§ 131

Consuls—their position and immunities.

In addition to their purely diplomatic agents, civilized states maintain in the territory of their neighbors commercial agents called *consuls*. Most powers have created various ranks in their consular service, from Consuls General down to Consular Agents, and many of them avail themselves, for the less important posts, of the services of merchants resident in the district in which they are to fulfil the duties of their office. It is admitted that consuls may be natives of the country that uses their services, or natives of the country in which they fulfil their duties, or natives of other countries domiciled in the country where they act. But the regular consular service of a state is almost invariably confined to its own subjects; and the members of such service, being specially trained and paid for their work and wholly devoted to it, receive more consideration than their non-professional colleagues, and in many states have higher privileges accorded to them.

The duties of consuls are numerous and varied. Not only do they look after the interests of merchantmen of the state whose agents they are, supervise the papers of such vessels, assist the masters to comply with local regulations, settle disputes between captains and crews, and succor seamen in distress, but they also advise subjects of the power they serve as to the proper execution of all legal documents, and see on the one hand that in matters of business the local laws are observed, and on the other, that their clients receive no injustice from the local authorities. They give aid to those who are present in such matters as marriages, devolution of property, testaments, and the proper registration of passports, and to those who are absent in such matters as successions, and protection to property. In addition they send to their govern-

ment reports on the commerce, industry, and agriculture of the state in which they reside. These often contain very valuable information, which is of the greatest assistance to the merchants and manufacturers of the state for which they act. Each member of the consular service has his district assigned to him. It may be a considerable area, or one large city or busy seaport. Its extent is matter for agreement between the sending and the receiving state; but outside it the consul has no authority and no privileges.[1]

Consuls are not clothed with the diplomatic character, nor do they possess diplomatic immunities, except in the special cases that will be considered immediately. They are appointed by the sovereign of the country whose agents they are, and they receive from the foreign office of the state where they reside a document called an *exequatur*, which authorizes them to act as consuls in that state, and to hold official communication with the functionaries of its internal administration. They are under the local law and jurisdiction. [Thus the German consul at Sunderland was convicted of high treason in 1914 for assisting German subjects to return to their native land on the outbreak of the great war. The conviction was quashed on appeal, but no doubt was entertained as to the general principle that no exemption from local jurisdiction existed.[2] This is far from implying that consuls have no privilege whatever. They must at least have sufficient immunity to enable them to discharge their functions efficiently, and this rather vague concession seems to be generally admitted.[3] The privilege, such as it is, should ensure them proper treatment when their office terminates on the outbreak of war. Some very discreditable maltreatment was suffered by certain consuls during the European war in the countries where they were officiating.[4] It would appear that when one belligerent is in military occupation of the territory of another, the *exequatur*

[1] Stowell, *Le Consul*, pp. 24–136.

[2] [*R.* v. *Ahlers*, L. R. (1915) 1 K. B. 616.]

[3] [Hall, *International Law*, 7th ed., § 105; Oppenheim, *International Law*, vol. I, § 434.]

[4] [Garner, *International Law and the World War*, vol. I §§ 34–36.]

of a consul in that district is suspended during the continuance of the occupation.][1] The private residences of consuls are not held to be exempt from the authority of the local functionaries. But the custom of regarding their official papers and archives as exempt from seizure is so general, and has been so frequently stipulated for in treaties, that inviolability may now be regarded as almost, if not quite, a right. Over the doors of their consulates, or official buildings, they may put up the arms of the state they represent, and its flags may be hoisted over the buildings themselves. Treaties very often give further privileges in the case of consuls whose sole occupation is to act as such, in that they belong to the regular consular service of a foreign state. They may not be compelled to serve in the army or militia, and soldiers may not be quartered on them. They pay no taxes in respect of their consulates, but possess no right of asylum, and must give up refugees who gain admission.[2]

In many Eastern countries, however, consuls are placed on a very different footing from that which they occupy in Western states. By treaty stipulations and immemorial custom they exercise jurisdiction, as we saw when dealing with the subject,[3] over citizens of the state whose agents they are, and in the exercise of this jurisdiction judicial functions necessarily fall on them. In order to protect them in carrying out these and other duties, they have a large share of the diplomatic immunities denied to consuls elsewhere. In times of disturbance or popular violence their consulates are used as places of refuge by their compatriots, and for others whose lives are in danger, and when the flag of their country is hoisted the buildings are held to be inviolable.[4] They have large rights of affording protection. A curious question with regard to the extent of these rights occurred lately in connection with the French military occupation of Casa Blanca in Morocco. The

[1] [Oppenheim, *op. cit.* § 437.]

[2] Stowell, *Le Consul*, pp. 139–184; Oppenheim, *International Law*, vol. I, §§ 418–438.

[3] See § 109.

[4] Hall, *Foreign Jurisdiction of the British Crown*, pp. 132–203; Halleck, *International Law* (Baker's ed.), vol. I, ch. XI.

German consul and his staff aided some deserters from the French army, three of whom were German subjects, in an unsuccessful attempt to escape. The two countries referred the matter to arbitration under the Hague Convention, and in 1909 the arbitrators decided that in the circumstances the rights of the military occupant overrode the consular right of protection. But they added words to the effect that the use of force to prevent the embarkation of the deserters and take them out of the custody of the consular staff was an act for which an expression of regret was due.[1] In several of the South and Central American republics consuls are used as agents for political purposes and accredited as chargés d'affaires. But in such cases the diplomatic character attaches to them and the consular character is merged in it. They gain the immunities of public ministers and must be treated as such. But these cases are exceptional and anomalous. The general rule about consuls is that they are commercial, not diplomatic, agents.

## § 132

We will now pass on to consider the treaty-making power and its methods of action, in so far as they are dealt with by International Law. In each state the right of making treaties rests with those authorities to whom it is confided by the political constitution. As long as there is some power in a country whose word can bind the whole body politic, other states must do their international business with it, and have no right to inquire into its nature and the circumstances of its creation. But other important matters connected with treaties are of international concern. The first of these to be discussed is

The treaty-making power. Ratification of treaties.

*The nature and necessity of ratification.*

Ratification is a formal ceremony whereby, some time after a treaty has been signed, solemn confirmations of it are exchanged by the contracting parties. No treaty is binding without ratification, unless there is a special agreement to

[1] *American Journal of International Law*, vol. III, pp. 698–701, 755–760; Oppenheim, *International Law*, vol. I, § 446 *a*.

the contrary. The full powers given to plenipotentiaries must be understood as conferring a right to conclude agreements subject to the ultimate decision of the governments that they represent. Sometimes, however, it is agreed that certain preliminary engagements in a treaty shall take effect immediately, without waiting for the exchange of ratifications, as was the case with the Treaty of London of 1840 for the settlement of the Egyptian question. A reserved protocol annexed to it stipulated that the preliminary measures mentioned in the second article should be carried out at once.[1] But when a treaty is ratified, its legal effects are held to date from the moment of signature, unless, as was the case with the Treaty of Paris of 1856, it is agreed that they shall come into force from the moment of ratification.[2] To this rule treaties of cession are an exception; for it is undoubted law that they commence to operate from the time of the actual transfer of the ceded territory.[3]

The question whether a state is bound to ratify a treaty signed by its lawful representatives is sometimes argued at great length by text writers. But a reference to practice robs it of its difficulties. When the ratifying power and the treaty-making power are placed by the constitution of a state in different hands, there cannot be the slightest obligation, moral or legal, for it to ratify. Other states know that the approval of two authorities has to be gained for a diplomatic instrument before it can be considered as agreed to, and they take their measures accordingly. The Senate of the United States has frequently refused to ratify treaties made by the executive power, or amended them as a condition of ratification. In 1897, for instance, it refused its assent to a treaty with Great Britain for the submission to arbitration of future disputes between the two countries; and in 1900 it introduced amendments that Great Britain was unable to accept into a treaty dealing with the Panama Canal. Fortunately the questions that arose were satisfactorily settled by the Hay-Pauncefote Treaty of the following year. [The Senate also

[1] Holland, *European Concert in the Eastern Question*, pp. 90–97.

[2] *Ibid.*, p. 244.

[3] Twiss, *Law of Nations*, vol. I, § 251.

refused for various reasons to ratify the Treaty of Versailles, 1919, by which peace was made between the principal allied and associated powers and Germany.][1] But when the treaty-making power and the ratifying power are vested in the same hands, it is held that some reason should be forthcoming to justify a refusal to ratify. If the negotiators have exceeded their powers, if any deceit as to matters of fact has been practised upon them, or if circumstances have entirely changed since the treaty was signed, there can be no doubt that a state is quite within its rights in declining to give the last formal sanction which calls the stipulations of its agents into operation. But modern practice seems to go further, and give support to the theory that the time between signature and ratification is granted to the parties for the purpose of thinking the matter over, and that if a state changes its mind in the interval for any reason that is at all distinguishable from mere caprice, it may refuse to complete the bargain by ratification. Thus the King of Holland refused in 1841 to ratify a commercial treaty he had concluded as Grand Duke of Luxemburg, on the ground that since he had signed it he had become convinced that it would injure the trade of his subjects,[2] and in 1884 Great Britain dropped an agreement she had concluded in 1883 with Portugal concerning the mouth of the Congo, the reasons being that its provisions were very far from satisfying the traders and others immediately concerned, and that it was proposed to settle the question along with many other similar questions at a great International Conference.[3]

[It is proper to note here that, by Article 18 of the Covenant of the League of Nations, 1919, every treaty or international engagement entered into hereafter by any member of the League, shall forthwith be registered with the Secretariat, and shall, as soon as possible, be published by it. Nor shall it be binding until it is so registered.]

[1] [*American Journal of International Law*, vol. xiv, pp. 155–206.]

[2] Twiss, *Law of Nations*, vol. i, § 251.

[3] Speech of Mr. Gladstone in House of Commons, March 12, 1885; see *Hansard*, 3d Series, vol. ccxcv, p. 975.

§ 133

Next among the matters of international concern connected with formal agreements between states we may mention

*The rules of interpretation to be applied to treaties.*

The interpretation of treaties.

A vast amount of misplaced ingenuity has been expended on this subject. Vattel devotes a whole chapter to it, and obtains as the result such rules as, "It is not permitted to interpret what has no need of interpretation," and, "We ought to take figurative expressions in a figurative sense."[1] But since states have no common superior to adjust their differences and declare with authority the real meaning and force of their international documents, it is clear that no rules of interpretation can be laid down which are binding in the sense that the rules followed by a court of law in construing a will or a lease are binding on the parties concerned. "There is no place for the refinements of the courts in the rough jurisprudence of nations."[2] We can hardly venture to go beyond the statements that ordinary words must be taken in an ordinary sense and technical words in a technical sense, and that doubtful sentences and expressions should be interpreted by the context, so as to make the treaty homogeneous and not self-contradictory. When states get into controversy about the interpretation of a treaty, they often make a new agreement, clearing up the disputed points in the way that seems most convenient at the time, which is not always the way pointed out by strict rules of interpretation.

§ 134

The last point we have to consider in this connection is

*The extent to which treaties are binding.*

The ancient and mediaeval fashion of giving pledges and hostages for the fulfilment of treaties has passed away, and states now rely on their own power, and on considerations

[1] *Droit des Gens*, bk. II, ch. xvii.

[2] Hall, *International Law*, 7th ed., § 111, note.

of self-interest and feelings of duty, to secure the observance of engagements entered into with them. In the eye of International Law treaties are made to be kept. Their obligation is perpetual, unless a time is limited in their stipulations, or they provide for the performance of acts that are done once for all, such as the payment of an indemnity or the cession of territory. That they were extorted by force is no good plea for declining to be bound by them. Most treaties of peace are made by the vanquished state under duress; but there would be an end of all stability in international affairs if it were free to repudiate its engagements on that account whenever it thought fit. The only kind of duress which justifies a breach of treaty is the coercion of a sovereign or plenipotentiary to such an extent as to induce him to enter into arrangements that he would never have made but for fear on account of his personal safety. Such was the renunciation of the Spanish crown extorted by Napoleon at Bayonne in 1807 from Charles IV and his son Ferdinand.[1] The people of Spain broke no faith when they refused to be bound by it and rose in insurrection against Joseph Bonaparte, who had been placed upon the throne.

The obligation of treaties.

But though the obligations of treaties, with the exceptions just mentioned, are perpetual as far as the utterances of International Law are concerned, it is clear that they cannot remain unchanged forever. No one now proposes to go back to the treaties of Münster or of Utrecht, and few would consider it desirable to return to the stipulations enacted at Vienna after the downfall of the first Napoleon. As circumstances alter, the engagements made to suit them go out of date. When, and under what conditions, it is justifiable to disregard a treaty, is a question of morality rather than of law. Each case must be judged on its own merits. It is impossible to lay down a hard and fast rule, such as was embodied, at the conference held at London in 1871 to settle the Black Sea question, in the words, "It is an essential principle of the Law of Nations that no power

[1] Fyffe, *Modern Europe*, vol. I, pp. 367–370.

can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement."[1] This doctrine sounds well; but a little consideration will show that it is untenable as the lax view that would allow any party to a treaty to violate it on the slightest pretext. If it were invariably followed, a single obstructive power would have the right to prevent beneficial changes that all the other states concerned were willing to adopt. It would have stopped the unification of Italy in 1860 on account of the protests of Austria, and the consolidation of Germany in 1866 and 1871 because of the opposition of some of her minor states. International Law certainly does not give a right of veto on political progress to any reactionary member of the family of nations who can discover in its archives some obsolete treaty, on the fulfilment of whose stipulations it insists against the wishes of all the other signatory powers. In truth these questions transcend law. They are outside its sphere; and its rules do not apply to them. Moreover, it must be remembered that sometimes provisions are inserted in a treaty more for show and to soothe wounded susceptibilities, than with any serious intention of having them carried into effect. Such was the stipulation in the Treaty of Berlin in 1878 that Turkey should garrison the Balkan passes with her troops, which should have, for that purpose only, a right to pass through Roumelia.[2] It was well known that the people of that province would not allow the Ottoman soldiers to pass and repass peaceably, and the Porte was not expected to exercise, and never did exercise, the right given to it on paper. A stipulation of the great International Treaty of Berlin was thus ignored from the beginning, and the consent of the contracting parties was never even asked; yet no accusations of bad faith have been bandied about, and the strictest moralists would hardly venture to say that the provision should have been acted upon at the risk of kindling another war. Each case has circumstances that are peculiar to it, and we must judge it on its

[1] British Parliamentary Papers, *Protocols of London Conference*, 1871, p. 7.
[2] Holland, *European Concert in the Eastern Question*, p. 289.

own merits, bearing in mind on the one hand that good faith is a duty incumbent on states as well as individuals, and on the other that no age can be so wise and good as to make its treaties the rules for all succeeding time.

The question of the obligation of treaties was raised by Austria-Hungary, in October, 1908, when she suddenly notified to the powers the extension of her sovereignty over the provinces of Bosnia and Herzegovina, which the Treaty of Berlin of 1878 had handed over to her to be "occupied and administered."[1] She had governed them for thirty years, and in all material matters her administration had been very successful, though she had failed to conciliate large sections of the population. Meanwhile, inroad after inroad had been made in the provisions of the great treaty. Bulgaria and Eastern Roumelia had been joined in spite of it; instead of the promised reforms in Asiatic Turkey the Armenians had been massacred, in some districts almost out of existence; and numerous small stipulations, such as those concerned with the Balkan passes, the Bulgarian tribute, and the fortifications of Batoum, had been ignored or evaded with impunity. A sudden revolution had just turned Turkey into the semblance of a constitutional state; and it was evident that the order of things to which the Treaty of Berlin applied could last but little longer. There was a strong case for adding Bosnia and Herzegovina to the Austrian dominions in name as well as in fact, if reasonable compensation were given to Turkey for the loss of her state-paper sovereignty. But the methods employed were most unfortunate. Austria-Hungary, which had been a party to the over-strong declaration of 1871, quoted above, ignored it entirely, and proceeded to act on her own mere motion, thus putting herself before the world as a treaty-breaker, when she might easily have approached all the signatories of the Treaty of Berlin with a demand for the enlargement of her mandate of 1878 by the change of administrative into sovereign rights. This would have led to a conference in which the whole group of questions connected with the Balkan peninsular would have come

[1] Holland, *European Concert in the Eastern Question*, p. 292.

up for settlement. A refusal of the Austrian demand would have been unlikely; but, had it occurred, it would then have been time for Austria-Hungary to declare the situation intolerable, and to give notice that she no longer held herself bound by an antiquated and impossible treaty. Her assumption of sovereign rights without any of these preliminary steps jeopardized the peace of Europe, undermined respect for solemn international obligations, imposed on her people the heavy burden of expensive military preparations, and brought down on her at the time a storm of obloquy, together with the lasting resentment of millions of embittered Slavs. And in the end she had to ask for and obtain the assent of the Great Powers, though it was given by means of separate diplomatic despatches, and not by means of a conference and a new international treaty. It remains to be seen whether the method of 1908 is superior to the methods of 1871 and 1878. Undoubtedly it is responsible for an enormous addition to the difficulties of Europe in the crisis brought about by the rising of the Balkan peoples against Turkey in 1912 and 1913.

[The principle that a treaty ceases to be binding when an essential change of the circumstances in which it was concluded has occurred is commonly known as the *rebus sic stantibus* doctrine. The real difficulty in its application is of course the question, "what is an essential change?" Other parties to the treaty can scarcely be expected to acquiesce in a unilateral declaration by the dissatisfied state that it regards the pact as no longer binding. An attempt to deal with this difficulty is made by Article 19 of the Covenant of the League of Nations, 1919, which provides that the Assembly of the League may from time to time advise the reconsideration by members of the League of treaties which have become inapplicable, and the consideration of international conditions whose continuance might endanger the peace of the world. On the face of it, this provision is a step forward, but the machinery for making it of practical use needs alteration; for the Assembly consists of representatives of all the states—nearly 50 in number—who are members of the League, and as the agreement of all of them is

in general required for any decision, it is difficult to imagine a case of unanimity in such a large body.[1] Art. 19 does not prevent a member of the League from resorting to such practice or lack of practice as prevails apart from the Covenant, and the result of Austria's action in 1908 shows that the wiser plan is in the first place to approach other signatories to the treaty, whether their approval of its modification be ultimately obtained or not. Thus the Article may be of some use as a means of testing opinion, in the sense that, if the state desirous of denouncing the treaty (or some part of it) puts its case before the Assembly and finds that it is not unanimously in favor of denunciation, the dissentient states may yet be so unimportant as to make neglect of their objection justifiable in fact, if not in law.] [2]

[1] [Oppenheim, *International Law*, vol. I, § 167 *s* (4).]

[2] [A remarkable perversion of the *rebus sic stantibus* doctrine was put forward by some German professors to justify the German invasion of Belgium in 1914. Garner, *International Law and the World War*, vol. II, § 449.]

# PART III—THE LAW OF WAR

## CHAPTER I

### THE DEFINITION OF WAR AND OTHER PRELIMINARY POINTS

§ 135

War may be defined as *a contest carried on by public force between states, or between states and communities having with regard to the contest the rights of states, the parties to it having the intention of ending peaceful relations, and substituting for them those of hostility with all the legal incidents thereof.* As a rule both the contest and the intention described in this definition must coexist in order to make a war. The former without the latter results in reprisals, not war, as will be seen in the next section. It is true that two states are said to be at war as soon as one of them has received a declaration of war from the other; but the interval between its reception and the first act of hostility is generally so short as to be negligible.

The nature and definition of war.

Some authorities regard war as a condition. Grotius, for instance, defines it as *status per vim certantium, qua tales sunt.*[1] But we speak of the condition of being engaged in hostilities as "belligerency"; while we reserve the word "war" for the series of hostile acts that take place during belligerency. War is a contest, not a condition; and moreover it is restricted to contests carried on under state authority directly or indirectly given. Private war has long ago disappeared from civilized societies. If individuals now attempt to redress their real or fancied wrongs by the might of their own hands, they are regarded by the law as disturbers of the public peace, and their act is an offence in itself, however gross may have been the injury that brought it about. It sometimes hap-

[1] *De Jure Belli ac Pacis*, bk. I, ch. I, 2.

pens that the authorization of the state, though given directly, is of necessity delayed for a time, as when a commander at a distance from his own country and without means of communicating immediately with his government deems such a serious emergency to have arisen as necessitates hostilities on his part against the local rulers and their subjects. In such a case, if his proceedings are adopted and ratified by his government, they are state acts from the first, and constitute a regular war; if, on the other hand, they are disavowed, they are acts of unauthorized violence for which reparation must be given. But a war such as was waged in the Autumn of 1893 by the armed forces of the British South African Company against Lobengula, king of the Matabele, and his tribe, is indirectly a state act, inasmuch as it is carried on by a chartered corporation under authority granted by the state. Whatever may be thought of the policy of allowing private associations to exercise many of the powers and prerogatives of sovereignty in their dealings with barbarous races, it is clear that the international responsibility for their wars belongs to the state that has delegated to them so many of its functions. Their force is its force; their wars are its wars; and their political arrangements are its political arrangements.

All war is now public war. Even the military and naval operations of revolted provinces or colonies have a public character impressed upon them by the process known as *recognition of belligerency*;[1] so that the dictum of Grotius that civil war is public on the part of the government and private on the part of the rebels[2] is no longer applicable. The other distinctions between different kinds of war are either unmeaning or obsolete. A formal war was one carried on by public authority and declared with due formality, whereas an informal war wanted both these characteristics. But we have just seen that all modern wars are waged by the authority of the supreme power in the state or the community striving to become a state. In a perfect war the whole state was said to be placed in the legal condition of belligerency, and in this sense of the term all wars are now perfect.

[1] See § 141.

[2] *De Jure Belli ac Pacis*, bk. I, ch. III, 1.

An imperfect war was limited as to persons, places, and things; and all wars are now limited to combatants so far as active hostile operations are concerned, and must of necessity be limited as to places and things since no power can cover the whole of the possible area of hostilities with its armed forces. Again, war was said to be offensive on the part of the aggressor in the struggle, and defensive on the part of those on whom the quarrel was fastened; and a distinction of the same kind was signified by the contrast between just and unjust wars, when it was not meant to convey the ideas set forth by the terms *formal* and *informal*. But these are moral questions, and modern International Law does not pronounce upon them. To it war is a fact that alters in a variety of ways the legal relations of all the parties concerned. It therefore tells us how the condition of belligerency is created, and what are the rights and obligations of belligerents towards each other and towards neutrals. But it does not pronounce upon the moral questions that occupy such a large space in the writings of the early publicists. Grotius,[1] for instance, after deciding in the affirmative the question whether war can ever be just, devotes several chapters to an attempt to distinguish between just and unjust causes of war. Such matters as these are supremely important; but they belong to morality and theology, and are as much out of place in a treatise on International Law as would be a discussion on the ethics of marriage in a book on the law of personal status.

## § 136

War must be distinguished from certain methods of applying force which are held not to be inconsistent with the continuance of peaceful relations between the powers concerned, though the distinction is found in the intent of the parties rather than in the character of the acts performed. In so far as the power against which these latter are directed is concerned, they are exactly the same as would be resorted to in the case of warlike operations. But the parties

Reprisals, or methods of putting stress upon a state by violence which is not held to amount to open war.

[1] *De Jure Belli ac Pacis*, bk. I, ch. II, and bk. II, chs. I, XX-XXVI.

to them do not choose to regard themselves as belligerents, and do not claim to subject other states to the burdens and disabilities of neutrals. The diplomatists on both sides continue their work, non-combatants are not obliged to suspend commercial intercourse at places outside the area of the forcible proceedings, and the legal concomitants of a state of peace continue to exist. The modes of putting stress upon an offending state which are of a violent nature, though they fall short of actual war, may be spoken of generically as *reprisals.*

The term is used in a bewildering variety of senses. Sometimes it means nothing more than a resort to the *lex talionis* in warfare. A commander who imprisons the mayor of an occupied town in retaliation for the murder of a sentinel by unknown inhabitants resorts to an act of reprisal; but it is an incident of warfare, not an attempt to bring an offending state to terms by an exercise of force that does not amount to war.[1] Again, we sometimes read of *negative reprisals* or *retortion;* but these are not acts of violence at all. They are carried on by adopting towards a state that is acting in an unfriendly, though peaceful, manner a similar line of conduct to that complained of in it. They have no connection with force or war. They take place, for instance, when differential duties are levied by one state upon the products of another which has discriminated against the former in its tariff, or when one state suspends payments due to another till some injury done to it by the latter is redressed. The older publicists make mention of yet another form of reprisal. They describe as *special reprisals* a method frequently resorted to in the Middle Ages, and sometimes in later periods, for the indemnification of private individuals for injuries and losses inflicted on them by subjects of other nations. Letters of marque were issued by the sovereign to those who had been wronged, and they were thereby authorized to recoup themselves by capturing vessels and cargoes of the offending nationality. And even after this legitimation of private warfare had come to be regarded as outrageous and

[1] [See § 209 (a).]

unworthy, a state occasionally sent out some of its warships with instructions to capture private vessels of the other side in sufficient numbers to reimburse its subjects for the losses they had sustained. Oliver Cromwell, for instance, gave redress in this way to a Quaker merchant whose vessel had been illegally seized and confiscated by the French. He sent the injured person to Cardinal Mazarin with a demand for restitution. And when the request was ignored, two English warships were despatched to seize French merchantmen in the Channel. The Quaker was compensated out of the proceeds of the sale of the prizes, and the balance was handed over to the French ambassador.[1] But the rise of modern notions of state responsibility, and the increase of the power of governments, have caused special reprisals to fall into disuse. The wronged individual would now be told by the rulers of his country that they would endeavor to obtain redress for him from the country to which the offender belonged. A diplomatic correspondence would ensue, and, if the complaint was well founded, redress would in all probability be given. But the transaction would be one between the states concerned, and the individuals with regard to whom the case arose would do no more than communicate each with his own government. The only kind of reprisals of a forcible character known to modern International Law is what used to be called by way of distinction *general reprisals*. They take place when a state that deems itself aggrieved performs warlike operations without the intent of making war. It may put pressure on the offending state by seizing or destroying property, holding territory, or capturing places or vessels; and unless the power that suffers any or all of these things retaliates by declaring war, International Law holds that what goes on is not war, but only reprisals. A conspicuous instance was afforded by the hostile acts of France against China in 1884 and 1885. The French Government felt aggrieved by the constant presence of bands of Chinese among the forces of Tonquin, which it was then engaged in subduing; but it did not wish to take the extreme measure of waging regular war against China. It, therefore, adopted what the French

[1] Phillimore, *Commentaries*, vol. III, § XXI.

Prime Minister, M. Jules Ferry, described as a policy of intelligent destruction. A French fleet bombarded the arsenal of Foo-Chow and took possession of certain points on the Chinese island of Formosa; but negotiations were going on all the while with China, the diplomatic ministers were not withdrawn, and a state of war was not held to exist between the two countries.[1] Other recent examples are afforded by the seizure of the custom-house at Mitylene by France in 1901, and again in 1905, by an international squadron, the object on both occasions being to put pressure on Turkey. Another case occurred in 1908 when the Dutch captured two Venezuelan coastguard ships in order to compel the cessation of various grievances for which they had endeavored in vain to obtain redress by diplomatic means. We see by these instances that the international acts of force comprised under the head of reprisals are varied and numerous. The chief differences between them and war are that they do not rupture diplomatic relations and abrogate treaties, and they are limited in their scope and, as a rule, localized in their operation. Two varieties of them are important enough to require particular description.

§ 137

The first of these special kinds is

*Embargo,*

or, more accurately, *hostile embargo*. Embargo pure and simple is nothing more than the detention of ships in port; and it may be put in force for good reasons by a state against its own vessels, as was done by the United States in 1807, when to avoid the violent action of both French and English cruisers neutral American merchantmen were for a time prevented from leaving American ports by the act of their own government.[2] A detention of this kind is called pacific embargo, and it has no necessary connection with any attempt to obtain redress for injuries received. But when

Embargo.

[1] *Annual Register, 1884*, pp. 280, 281, 369–376; *Annual Register, 1885*, pp. 206–214, 330–335.

[2] Moore, *International Law Digest*, vol. VII, p. 143.

merchant vessels of an offending state are detained in the ports of a state that deems itself aggrieved, we have an instance of such an attempt, and it is called hostile embargo. The legal effects of hostile embargo were stated by Lord Stowell in a luminous judgment in the cases of the *Boedes Lust*,[1] which arose in 1803. After the rupture of the Peace of Amiens, Great Britain had good reason to believe that Holland was only waiting for an opportunity in order to join France against her. An embargo was, therefore, laid on all Dutch vessels in British ports with the object of inducing Holland to give up her alliance with Napoleon. Its effect was just the contrary. War broke out, and the question of the legal effect of the original seizure of the Dutch vessels came before a prize court. Lord Stowell [then Sir William Scott] laid down that hostile embargo was at first equivocal in its legal aspects and its real character was determined by the events that followed it. If war broke out, its commencement had a retroactive effect and made the seizure belligerent capture from the first. If satisfaction was given and friendship restored between the two states, the original seizure amounted to nothing more than temporary sequestration, and worked no disturbance of proprietary rights. In the latter half of the eighteenth century and the early years of the nineteenth, embargo was often resorted to in contemplation of hostilities. If a state found in its ports a considerable number of vessels belonging to a probable adversary, it was apt to seize the opportunity and lay hands upon them before the actual outbreak of war. But the growth of commercial interests, and a quickened sense of justice, caused the practice to be discontinued; and in modern times belligerents have generally gone further, and refrained from capturing the merchant vessels of the enemy found in their ports at the commencement of a war, allowing them instead a fixed period in which to depart without molestation. The right to confiscate remained, but as an act of grace it was not exercised. The Sixth Convention of the Hague Conference of 1907 [purported to take it away, but its details are more appropriate to a later section.[2]]

[1] C. Robinson, *Admiralty Reports*, vol. v, pp. 244–251. [2] [See § 182.]

§ 138

The second variety of reprisals to which we must give special attention is the practice called

*Pacific Blockade.*

Pacific blockade.

It takes place when a power that considers itself aggrieved, institutes a blockade[1] of a port or ports of the state it deems to have offended, without at the same time putting the general relations between them on a hostile footing. The first instance of it occurred in 1827, when Great Britain, France, and Russia blockaded the coasts of Greece in order to cut off supplies from the Turkish force operating on the Greek mainland, and thus induce Turkey, with whom they remained at peace, to accept their mediation in its war with its revolted Greek subjects.[2] From that time onwards pacific blockades have been resorted to at intervals, as a means of putting pressure upon states with whom it was not deemed necessary or desirable to resort to regular hostilities. At first the new practice was somewhat haphazard in its character; but as it hardened into an international habit a divergence showed itself between the views of Great Britain and France. The former held that the power which establishes a pacific blockade gains thereby no right to interfere with the shipping of states who are not parties to the quarrel, and as against the vessels of its adversary its rights do not extend to confiscation, but stop at sequestration. The latter maintained that the blockading state was at liberty to capture and confiscate not only the ships of the blockaded state, but those of third powers also if they attempted to cross the lines of the blockaders. The matter came to a head in 1884, when the French established what they regarded as a pacific blockade of part of the coast of Formosa, as an incident of their operations for reducing China to terms without a resort to open war. But, inasmuch as they claimed a right to capture vessels of third powers, Great Britain protested. The French Government declared that its public armed ships would not resort to search

[1] See Part IV, ch. v. [2] Holland, *Studies in International Law*, pp. 136, 137.

and capture on the high seas, but would seize any merchantman, whether of Chinese or other nationality, that attempted to enter the blockaded ports; and Earl Granville, who was then the English Secretary for Foreign Affairs, replied that in that case Great Britain was obliged to hold that a state of war existed between France and China, and must put in force her neutrality regulations in the ports of Singapore and Hongkong. In consequence of this France claimed and exercised full belligerent rights against neutrals; but the matter was settled almost immediately by the restoration of normal pacific relations with China.[1] Events took much the same course in 1893, when France claimed a right to interfere with British merchantmen in the course of her pacific blockade of the mouth of the Menam in order to induce Siam to accept her terms. For a short time matters looked serious; but the satisfaction of the French demands by the Siamese Government put an end to the incident.

Meanwhile opinion and practice were ranging themselves on the side of the less onerous doctrine. In 1886 the Great Powers, with the exception of France, established a pacific blockade of the coasts of Greece, in order to prevent the Greeks from making war on Turkey, and thus precipitating a great European struggle. The allied fleets abstained from molesting the vessels of powers unconnected with the quarrel. They were instructed to detain all vessels under the Greek flag attempting to run the blockade, but it was added that even Greek ships were not to be seized when any part of their cargo belonged to subjects of a state other than Greece or the blockading powers, should such cargo have been shipped before notification of the blockade, or after notification but under a charter made before notification. The blockade was raised in a few weeks in view of the pacific assurances of a new ministry and the commencement of Greek disarmament; and while it lasted no protests were raised by states unconnected with it.[2] In the following year the Insti-

[1] British Parliamentary Papers, *France*, No. 1 (1885), pp. 1–13; French State Papers, *Affaires de Chine* (1885), pp. 1–15.

[2] British Parliamentary Papers, *Greece*, No. 4 (1886), p. 14.

tute of International Law resolved at Heidelberg that pacific blockade was legal, if it was effective, and duly notified, and did not interfere with ships under a foreign flag, and applied to the vessels that were seized no further severity than detention during its continuance, with release, though without compensation, at its termination.[1]

The next few years produced the two anomalous cases of Zanzibar and Crete.[2] The operations that took place in them are usually classed as pacific blockades, but would be more accurately described as measures of international police in which something analogous to a blockade bore the principal part. In both cases the local sovereign gave his consent to what was done; whereas ordinary pacific blockades resemble warlike blockades in being undertaken against his will, and in order to coerce him. In the case of Zanzibar in 1888 and 1889 the Western powers brought pressure to bear on insurgents and slave traders. In the case of Crete in 1897 the Great Powers of Europe brought pressure to bear on Greece, who wished to acquire the island, and on the Cretan patriots, who wished to wrest it from Turkey in order that it might unite with the Greek kingdom. They also prevented the Sultan from making any attempt to reduce it. In neither case were the ordinary rules of blockade, whether pacific or warlike, applied in their entirety. In both, vessels on some errands were let through, and vessels on others stopped. In the case of Crete all Greek ships were seized, but the ships of other nations, including the six blockading powers, were allowed to enter and land their merchandise if it was not destined for the Greek troops or for the interior of the island. Thus the blockaders contrived most ingeniously to violate the law of blockade, under whichever head of it they chose to class their operations. If it was warlike blockade, they had no right to discriminate against ships of any nation, or ships engaged in any particular form of lawful trade, but were bound to exclude all alike. If it was pacific blockade,

[1] *Annuaire de l'Institut de Droit International*, 1887–1888, pp. 300, 301.

[2] Holland, *Studies in International Law*, pp. 139, 140, 146–150; Moore, *International Law Digest*, vol. VII, pp. 138–140.

according to the generally accepted view, they had no right to stop ships of powers unconnected with the dispute; and though, according to the French variant they might do this, they certainly might not let their own ships through on conditions while excluding Greek ships absolutely. Their measures may have been well adapted to the peculiar circumstances they had to meet. But pacific blockade in any previously accepted sense of the term assuredly they were not. The same may be said of the blockade instituted in April, 1913, against Montenegro by the Great Powers of Europe with the exception of Russia.

Passing by these anomalous cases, we come next to the blockade of Venezuelan ports by Great Britain and Germany in the winter of 1902–1903, in order to compel the settlement of pecuniary claims. Germany was at first disposed to resort to a pacific blockade, but yielded in the end to the wishes of Great Britain and established a state of war with Venezuela, though no formal declaration of war was made. The reason for this was that both powers wished to be able to stop neutral shipping, and knew that unless they were belligerents they would not have a legal right to do so. An intimation that the United States did not "acquiesce in any extension of the doctrine of pacific blockade which may adversely affect the rights of states not parties to the controversy, or discriminate against the commerce of neutral nations" contributed towards the German change of view. On December 20, 1902, a notice of warlike blockade was issued; and the operations against Venezuela were undoubtedly a war, though a little one.[1] They were concluded by a formal agreement in February, 1903. [The blockade of Greece by Great Britain and France in 1916–1917 was certainly not limited to Greek vessels, for ships of third powers were given a period of departure from Greek ports, the implication of course being that they were liable to capture after that time.[2] It has been argued on the one hand that this was indefensible, as Greece was then neutral, and on the other hand that it was justifiable as an

[1] Moore, *International Law Digest*, vol. VII, pp. 140, 141.

[2] [*Revue Générale de Droit International*, vol. XXIV. Documents, p. 53.]

act of reprisal for the unneutral conduct of Greece. Perhaps, as has been already suggested, the blockade may be regarded as an incident in an intervention which was justifiable under treaty right. But if Greece were technically neutral, the question is still left open whether the ships of other neutral powers should have been affected by the blockade.][1] The diplomatic history of the question shows clearly that the view of pacific blockade taken by the Institute of International Law is prevailing. It is held now by nearly all the jurists of the civilized world; and we may hope that it will receive the consecration of general assent on the part of the powers at the next Hague Conference. It is the only one consistent with sound principle, since no power has the right to prevent the ships of other powers from trading in time of peace with ports opened to them by the local sovereign. But if no trade other than that of the blockading and the blockaded powers is molested, it is impossible to say that any international offense is committed. The parties immediately concerned must be allowed to settle their disagreement in their own way, as long as they do not interfere with the rights of those who have no concern with the matter in dispute. The question whether the vessels seized by the blockaders should be confiscated or sequestrated is a comparatively small one, as long as the seizures are confined to ships of the power against which the blockade is instituted. It might well be left to the blockading government. The treatment would then in all probability be varied according to the circumstances of the case. If the controversy arose about a pecuniary claim, confiscation of vessels till their value reached the amount in dispute would be a natural and unexceptionable way of obtaining satisfaction, when the mercantile marine of the state accused of delinquency afforded prizes of sufficient richness.

§ 139

The power against which reprisals of any kind are instituted can, if it pleases, resort to war in return; and it is cer-

[1] [See § 64. Ion, *The Hellenic Crisis, American Journal of International Law;* vol. XII, 806–812. Garner, *International Law and the World War*, vol. II, §§ 465, 510. Fauchille, *Droit International Public*, vol. II, § 1656.[19]]

tain that any powerful and high-spirited nation would do so. Self-respect would forbid it to give way under violent and coercive pressure, though it might have been willing to settle the question at issue, after negotiation, by some acceptable concession. But in cases where a strong state or group of states finds itself obliged to undertake what are practically measures of police against weak and recalcitrant powers, one or other of the means just described may be a useful alternative to war. They are less destructive and more limited in their operation. It is true that they may be used to inflict injury on small states, and extort from them a compliance with unreasonable demands. But war can be equally unjust, and would certainly cause more suffering. There seems no reason to endeavor to banish from International Law its sanction of these anomalous operations, which are neither wholly warlike nor wholly peaceful. What should be done is to create a strong public opinion against their use on slight provocation, or for a manifestly unjust cause. Moreover, it is necessary to guard against a new danger which has arisen in consequence of the decision of the last Hague Conference that formal declarations of war must precede the commencement of hostilities.[1] This rule does not, of course, apply to measures that are not war, though, like war, they involve acts of force. Consequently strong powers may be tempted to evade the new obligation by making sudden attacks on weak states under the guise of reprisals. Professor Westlake proposes to meet this danger by a rule to the effect that no form of reprisals "shall be used against any state unless it refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any agreement of reference from being concluded, or, after an arbitration, refuses to submit to an award."[2]

The value and admissibility of reprisals.

## § 140

A *declaration of war* is a formal notification on the part of a state that it considers itself at war with another state to

[1] See § 140.

[2] *Law Quarterly Review*, April, 1909, p. 136. See § 221.

which the notification is sent. The question whether such declarations are necessary was answered in the affirmative by the Hague Conference of 1907. But before we give the exact terms in which it ended a controversy as old as International Law, it will be advisable to state very briefly how matters stood before its intervention. Among the early publicists there was a great preponderance of opinion in favor of the doctrine that no state ought to commence hostilities before it had sent to its opponent a formal notice of its intention to fight. But if we turn to practice we find that, though in the Middle Ages heralds were generally despatched with much ceremony to give the enemy warning, sometimes the notice itself was turned into an insult, as when Charles V of France declared war in 1369 against Edward III of England by a letter the bearer of which was a common servant.[1] After the decay of the mediaeval order the use of heralds gradually ceased. It was followed by formal diplomatic statements to the other side of a determination to commence hostilities. But these were often omitted, and at last in the eighteenth century they become the exception rather than the rule. Such declarations as we do find were made more often than not some time after acts of hostility had been going on. For instance, fighting commenced between England and France by land and sea in 1754, but the formal declarations of war were not made till 1756. One more case will suffice out of the many that lie ready to hand. At the end of 1787 Austria seized various Turkish fortresses, but she did not declare war till February, 1788.[2] Little change took place till the latter part of the nineteenth century, when the practice of making declarations before resorting to the use of force showed signs of revival. In 1870 the French chargé d'affaires at Berlin handed in a formal declaration of war before the outbreak of hostilities between France and Prussia, and in 1877 a despatch declaring war was given to the Turkish representative at St. Petersburg.

With such a history as this behind them, it is evident that modern jurists could not insist on the ancient view that Inter-

[1] Ward, *History of the Law of Nations*, vol. II, p. 208.

[2] Maurice, *Hostilities without Declaration of War*, pp. 20, 21, 26, 27.

national Law required a formal declaration of war as a preliminary to any warlike acts, or at least as contemporary with them. The contrary doctrine that no declaration is necessary was the only one that could be deduced from the practice of nations; and practice was the only evidence of their consent before the existence of a general international agreement embodied in a binding document. We find, therefore, that most writers on the subject uphold the latter view, though there still remain some who follow the ancient authorities, in a laudable endeavor to provide against treacherous attacks. But their zeal for righteousness causes them to fall into the old confusion between what is and what ought to be. International morality does undoubtedly demand that no hostile operations shall be commenced without warning. This is, however, a very different thing from commencing without declaration. To attack another state in a period of profound peace, without having previously formulated claims and endeavored to obtain satisfaction by diplomatic means, would amount to an act of international brigandage, and would probably be treated accordingly. But the state of things set up by such abominable means would nevertheless be war, and both sides would be expected to carry on their operations according to the laws of war. When in 1904 Admiral Togo made his celebrated dash on the Russian fleet in the outer harbor of Port Arthur, Japan was immediately accused, not of being engaged in operations that could not be regarded as war but, as having commenced a war by "a treacherous attack."[1] The facts of the case lent no countenance to this view. Negotiations had been going on without avail since July, 1903. On February 6, 1904, the Japanese minister at St. Petersburg handed to Count Lamsdorff, the Russian Foreign Secretary, a note which not only broke off diplomatic negotiations, but added that the government of Japan "reserved to themselves the right to take such independent action as they may deem best to consolidate and defend their menaced position." This was an unmistakable warning that hostilities might be expected

[1] Russian Manifesto of February 18, 1904. See Takahashi, *International Law Applied to the Russo-Japanese War*, p. 8.

at any moment. On the day it was delivered the Japanese squadron sailed from Sasebo and one of its vessels captured a cruiser of the Russian Volunteer Fleet. On the 8th the Russian warships at Port Arthur were seriously damaged by Japanese torpedo boats, and on the 9th an action was fought off Chemulpo, as a result of which a Russian cruiser and gunboat were destroyed. After acts of hostility had been going on for four days, Japan published a formal declaration of war on February 10.[1]

There can be no doubt that the conduct of the island empire on this occasion was in no way open to the charge of treachery. It was well within approved precedents. But the controversy it provoked called the attention of the civilized world to the matter; and the obvious unreality of making declarations of war some time after the war has commenced was incapable of explanation on any reasonable grounds. No doubt it had become a settled rule of International Law in such cases to date the commencement of war, with all the legal changes it involves,[2] from the first act of hostility. But it is often difficult to settle what is the first act of hostility. Expert opinions have differed as to the particular war we are now discussing. A Japanese prize court at Sasebo decided in the case of the *Argun* that "the war commenced when the Japanese fleet left Sasebo with the intention of attacking the Russian fleet"; but a higher court declared soon after in the case of the *Mukden* that the state of war between the two countries dated from the capture of the *Ekaterinoslav*, the first vessel seized by Admiral Togo's squadron on its way to Port Arthur.[3] Clearly there were strong grounds for what may be termed international legislation on the matter. And it was equally clear that the objects of any such legislation must be to provide for a notice so unequivocal in character that no charge of treachery could arise, to remove all doubt as to the exact moment when a

[1] Takahashi, *International Law Applied to the Russo-Japanese War*, pp. 14, 15, 761.

[2] See §§ 143–146.

[3] Takahashi, *International Law Applied to the Russo-Japanese War*, pp. 23, 602.

state of war was substituted for a state of peace, and to secure for neutrals immediate notice of an event that makes so important a change in their own rights and duties. The second Hague Conference set itself to accomplish these ends, and its efforts were successful. The third of its Conventions dealt with the subject, and the first article laid down that hostilities between the contracting powers "must not commence without previous and explicit warning, in the form either of a declaration of war with the reasons assigned for it or of an ultimatum with conditional declaration of war." It is obvious that these words apply only to the side which decides to resort to immediate hostilities, and not to that which awaits action on the part of its adversary, even though it may have so acted as to force on the war of set purpose, and be so well prepared that it strikes the first blow. The position of neutrals was defined and protected in the second article, which provided that "the existence of a state of war must be notified to the neutral powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph." But in the absence of such a notification the rights and duties of neutrals will accrue to states, "if it is clearly established that they were in fact aware of the existence of a state of war."[1]

The Convention has been signed by all the powers represented at the Conference. What it asserts may therefore be regarded as the law of the civilized world. It is true that the phrasing of the articles does not in so many words pledge the contracting powers to commence their future wars with formal declarations. But when they are made to say that hostilities must not commence without declaration, they do in effect pledge themselves to declare, since no power would care to face the accusation of violating a rule after stating in a solemn international agreement that it ought always to be observed. It is important to note that, according to the terms of the

[1] Higgins, *The Hague Peace Conferences*, pp. 198, 199; Whittuck, *International Documents*, p. 121; *Supplement to the American Journal of International Law*, vol. 2, pp. 86, 87; British Parliamentary Papers, *Miscellaneous*, No. 6 (1908), p. 43.

first article of the Convention, the declaration must be issued before the first act of force takes place (*préalable*). It must also be perfectly clear and unmistakable in its terms (*non équivoque*), and must give reasons why the state that issues it has resorted to war (*motivée*). The attempt of Holland to secure an interval of twenty-four hours between notice and attack failed. The blow may fall immediately after the declaration is made. But, treachery apart, in no case when common prudence has been exercised can a state be taken altogether unawares; for sudden demands which have not been answered and negotiated upon cannot supply the material for the reasoned declaration that is required. No law can prevent deliberate perfidy. All that can be done by the legislator is to make it difficult, and this the second Hague Conference has accomplished with regard to the matter before us. On the other hand its regulations do not deprive a well-prepared power of the advantage of striking the first blow, for "notice to your adversary that you are tired of negotiating and mean to fight is by no means the same thing as notice that you will attack at a given place, on a given day, and at a given time."[1]

The Convention, as we have seen, offers an alternative to a declaration of war in the shape of an ultimatum with conditional declaration. When one power makes demands on another, and couples with them an intimation that war will be the cost of their rejection, it is said to present an ultimatum; and when the ultimatum contains a statement to the effect that unless a favorable reply is given by a certain time hostilities will then begin, it is an ultimatum with conditional declaration of war. If it is left unanswered, or answered unfavorably, a state of war commences at the time named, no further declaration being required, [though there is of course no objection to the issue of one. A recent example is to be found in the British notification to Germany, on August 4, 1914, that the British government would take all steps in their power to uphold the neutrality of Belgium, unless Germany would give an assurance by midnight that she

[1] Lawrence, *International Problems and Hague Conferences*, p. 90.

would proceed no further with the violation of the Belgian frontier. This ultimatum was not complied with, and Great Britain then issued a declaration of war.[1] In general, the rules of the Convention were observed by the various powers who entered the great war. But Germany invaded French territory on August 2, 1914 (the day before she declared war); her excuse, which she herself subsequently admitted to be unfounded, being that French aircraft had dropped bombs near Nuremberg on August 2. Further, Austria commenced war on Japan by hostile acts, and not by a declaration; and so did Turkey on Russia and France, and Bulgaria on Serbia.][2]

The reference to neutral powers in the second article of the Convention is a recognition of the fact that their interests, as well as those of belligerents, are involved in the substitution of a state of war for a state of peace. When the change comes, it involves both neutral governments and neutral individuals in a complex of new obligations, and confers on them a number of new rights. Obviously it is most important that they should know the exact time when the alteration in their legal position takes effect. The parties to the struggle are, therefore, bound to send them without delay notification of the outbreak of war, a message by telegraph being deemed sufficient. Without such notification belligerents cannot enforce their rights against neutrals, unless they are able to show that the requisite knowledge has been acquired in some other way. With modern means of communication a war is not a thing that can be kept concealed. Its existence would be known all over the world in a very short time. But nevertheless the rule that neutrals are not liable for breach of neutrality till knowledge of the outbreak of war has been brought home to them, might affect the validity of captures made at sea in the first outburst of a maritime conflict. In addition to the mere notification required by the Convention, belligerents will probably continue to issue the manifestoes it has long been customary for

[1] [*British Parliamentary Papers*, Misc. No. 6 (1914). Nos. 153, 159 (pp. 75–76, 77).]

[2] [Fauchille, *Droit International Public*, vol. II, § 1030 [1].]

them to publish in their own territories, as a warning to their subjects and a justification of themselves before the world. And doubtless copies of these manifestoes will be sent, as heretofore, to neutral governments.

§ 141

The meaning and effects of recognition of belligerency.

Every independent state decides for itself whether it shall make war or remain at peace. If it resorts to hostilities it obtains as a matter of course all the rights of a belligerent. Other states have no power to give or to withhold them. But the case is very different with regard to such communities as are not already states in the eye of International Law, though they are striving to become independent, and to have their independence recognized by other powers.[1] Technically they form portions of old-established states. Practically each is in revolt against the state organization to which it belongs in law, and is endeavoring to set up a separate state organization for itself or to gain control of the existing organization. By the municipal law of the country of which the community is still legally a part its members are traitors and liable to punishment as such. Yet they are carrying on open war under the orders of authorities analogous to those of recognized states. How then are they to be treated? International Law gives no answer to this question as far as the government against which they are in revolt is concerned. Questions between it and its rebels are domestic questions to be resolved by internal authority. In modern times when civil strife reaches the dimensions of a war the parent state invariably treats the insurgents as belligerents, partly from motives of humanity and partly because it does not care to expose its own forces to military reprisals. An instance of this on a large scale is afforded by the events of the American Civil War. The Supreme Court decided in the case of the *Amy Warwick*[2] that the Confederates were at the same time belligerents and traitors, and subject to the liabilities

[1] See § 46.

[2] Black, *Reports of the U. S. Supreme Court*, vol. II, p. 635.

of both. In practice, however, they were treated as belligerents throughout the struggle. But if third parties are affected by the war, International Law steps in and gives them rules by which to govern their conduct towards the combatants. It lays down that they may under certain circumstances grant to the side in arms against the parent state all the rights of lawful belligerents. The notice of their intention to do this is called recognition of belligerency. It must be publicly given, either in words, or by the performance of acts peculiar to the relation between a neutral and a belligerent community. It does not confer upon the community recognized all the rights of an independent state; but it grants to its government and subjects the rights and imposes upon them the obligations of an independent state in all matters relating to the war. It follows from this that the powers that give such recognition are bound to submit to lawful captures of their merchantmen made by the cruisers of the community recognized, or by those of the mother country. They must also respect effective blockades carried on by either side, and treat the officers and soldiers of the rebels as lawful combatants, no less than the officers and soldiers of the established government.

Since recognition of belligerency has such important legal effects, it is necessary to discuss the circumstances in which it may be given by third powers without offence to the parent state. Two conditions are necessary. The struggle must have attained the dimensions of a war, as wars are understood by civilized states; and the interests of the power that recognizes must be affected by it. The first condition is satisfied when the revolted community is seated upon a definite territory, over which an organized government exercises control except in so far as parts of it may be in the military occupation of the enemy, in which forces are levied and organized, and from which they are sent into the field to combat according to the rules of civilized warfare. The second condition is satisfied when there are so many points of contact between the subjects of the recognizing state and the warlike operations, that it is necessary for it to deter-

mine how it will treat the parties to the struggle. When an insurrection is confined to a district in the interior of a country, other states would be acting in an unfriendly manner if they recognized the belligerency of the insurgents, because by the nature of the case the incidents of the conflict could not directly affect their subjects. But if a frontier province rebelled, it would be difficult for the neighboring power or powers to avoid coming to a decision on the question whether or not the rebellion amounted to a war; and should the struggle be maritime, states interested in seaborne commerce could hardly refrain from recognition, if the area of hostilities was wide and the interests at stake were great and various. The status of cruisers, the legality of blockades, and the validity of captures must be determined. What is lawful treatment of neutral merchantmen, if there is a war, is unauthorized and illegal violence, if there is not; and inasmuch as recognition of belligerency relieves the parent state from responsibility for the acts of the insurgent cruisers, and allows it to treat the vessels of the recognizing power as belligerents treat neutral shipping, it is almost as much benefited by the act as are the people in revolt against it. All these points were thoroughly discussed in the controversy that arose between Great Britain and the United States with regard to the recognition by the former of the belligerency of the Southern Confederacy in the spring of 1861. It is generally admitted now that the conduct of the British Government was perfectly lawful, and the recognition neither uncalled for nor premature; for great commercial interests were involved, and President Lincoln had proclaimed a blockade of the Southern ports three weeks before Queen Victoria's proclamation was issued.[1] [So far we have spoken of recognition of belligerency accorded by a neutral state. It can also be given by a belligerent state to a body of rebels against the government of the opposing belligerent. Thus, in 1918, Great Britain, France, Italy, and the United States of America, who were all at war with Germany and Austria, recognized the Czecho-Slovaks as belliger-

[1] Moore, *International Law Digest*, vol. I, pp. 184–193.

ents in their struggle against the Central Empires. Does recognition of this kind differ from recognition of belligerency by a neutral state? Must the same conditions be satisfied before it can be granted? According to one view, if a state be at war with another, and rebellion break out in the latter, there is nothing unlawful in encouraging the rebels in every possible way, including the recognition of them as belligerents. It is merely taking to oneself an additional ally, though that ally may meet the penalties of treason as well as the risks of warfare at the hands of its mother country. If that be so, the inference might follow that it is quite immaterial whether the rebels possess fixed territory, have an organized government, or fight like civilized beings. To this it may be replied that no state has the right to connive at—much less to encourage—barbarous modes of warfare on the part of an ally, and that even if no other condition of recognizing belligerency be satisfied, yet compliance of the rebels with the laws of war must be. Nor is it very clear how there can be any guarantee for such compliance, unless they have over them an organized government, and this in its turn seems to imply that the government has some territory under its control. The Czecho-Slovaks fulfilled all these conditions before they were recognized, and it is submitted that in future recognitions of the same kind similar requirements should be made, though it may well be that the condition as to a definite amount of territory cannot be pressed too closely.[1] Another possible solution would be to treat the case as one not of recognition of belligerency but of insurgency, and this we now proceed to discuss.]

## § 142

In modern times the question has arisen whether recognition of a condition midway between belligerency and mere unauthorized and lawless violence might not be given with

[1] [*American Journal of International Law*, vol. XIII, pp. 93–95. Garner, *International Law and the World War*, vol. I, § 26. Oppenheim, *International Law*, vol. II, § 76*a*. Fauchille, *Droit International Public*, vol. II, § 1088 [1] (where an untenable distinction seems to be taken between a belligerent fomenting a rebellion and recognizing one already in being).]

advantage. Suppose, for instance, a fleet revolts unsupported by any province or port, and its vessels carry on the ordinary operations of naval warfare without making the slightest attempt to hoist the black flag and depredate on the sea-borne commerce of the world. They cannot be looked on as regular belligerents, because belligerency and territory are inseparably connected. Nor ought they, on the other hand, to be classed as denationalized rovers of the seas, liable to be attacked and destroyed by the warships of any state, for their operations have a political object, and are limited to hostilities against the government they are seeking to overthrow. Recognition of independence is out of the question. Recognition of belligerency cannot be granted without giving them the right to subject the merchantmen of the grantor to all the severities that states at war may inflict on neutral vessels. Common sense and humanity condemn the idea of treating them as pirates. The only course remaining is to interfere in no respect with the struggle between them and the loyal forces of their own country, as long as they refrain from injury to the persons or property of subjects of other powers. They cannot be allowed to exercise the right of search on board quasi-neutral vessels, or to blockade against them the ports of the mother country, or to capture them for carrying contraband or engaging in unneutral service. Nor may they bombard those quarters of the mother country's coast towns which are largely inhabited by subjects of other powers or full of property belonging to such persons. In all other respects their operations should be left unrestrained, and regarded as regular warfare. Such cases will be rare, but they are by no means unknown. Two of considerable importance have arisen in recent times. In 1891 the insurrection of the Chilian Congressional party which finally overthrew President Balmaceda began with a revolt of the fleet, and some little time elapsed before land forces and provinces joined in the movement. And in 1893 the Brazilian fleet revolted, and for seven months occupied the inner harbor of Rio de Janeiro, till in March, 1894, it surrendered to the government. In

Recognition of insurgency.

both cases foreign states showed a strong tendency to assign to the insurgents the position we have just indicated, though they made various reservations and exceptions which showed that their governments had not clearly thought out the legal consequences of the principles they had adopted.[1] The fall of Balmaceda in Chile, and the triumph of the republican government in Brazil put an end to all difficulties at the moment. And the subsequent consideration of these and other cases by international jurists has created a strong body of opinion in favor of such a course as we have recommended on the part of states unconcerned with the dispute.

The principles involved are by no means confined to cases where no land territory has joined in the insurrectionary movement. They apply as well to all revolts and civil wars in which the insurgents cannot well be recognized as belligerents because of their comparative unimportance, or their deficiency in organization and resources, or their lack of points of contact with the outside world. But since they are carrying on political objects by means known to the laws of war, they cannot be regarded as outlaws by foreign powers, however much it may please the authorities against whom they are acting to describe them as such. Their position has been called insurgency, and matters would be simplified if the official acknowledgment of its existence were called recognition of insurgency.[2]

## § 143

The outbreak of the war brings about *ipso facto* an important change in the legal relations of the subjects of the belligerent states. Diplomatic intercourse ceases, if it had not come to an end before; and consuls are no longer permitted to perform their functions. The public armed forces on each side are at once endowed with the right to carry on active hostilities according to the ordinary rules of warfare; and the rights

The immediate legal effects of the outbreak of war.

[1] Lawrence, *Recognition of Belligerency considered in relation to Naval Warfare*, pp. 10-18, a paper in the *Journal of the Royal United Service Institution*, January, 1897; Moore, *International Law Digest*, vol. I, pp. 201–205, vol. II, pp. 1107–1120. [Hall, *International Law*, 7th ed., § 5*a*.]

[2] G. G. Wilson, *Insurgency*, pp. 13–17.

of private individuals with regard to ordinary intercourse with subjects of the hostile state are immediately curtailed. No transactions injurious to their own side must be entered on by them. They must give no aid and comfort to the enemy. They may not buy public funds and securities created by his government during the war. It is treasonable for them to send him intelligence about the plans and operations of their own side. To a very considerable extent, therefore, the subjects of enemy states are enemies, though numerous mitigations have blunted the severity of the old doctrine that the outbreak of war authorizes indiscriminate violence between all members of the hostile nations. Non-combatants are exempt from most of the severities of warfare; but they are not free to act as if no war existed.

With regard to commercial intercourse there are two views. The older was set forth by Sir William Scott in the case of the *Hoop*.[1] He declared it to be "an universal principle of law" that "all trading with the public enemy, unless with the permission of the sovereign, is interdicted." He then drew attention to the fact that English law applied with great vigor a principle that was to be found in the law of almost every country, that "the character of alien enemy carries with it a disability to sue or to sustain in the language of the civilians a *persona standi in judicio*." From this he obtained a further argument in favor of the proposition that commerce with enemy subjects is illegal; for "if the parties who are to contract have no right to compel the performance of the contract, nor even to appear in the court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract?" This view was adopted and enforced by the courts of the United States, and seems to have been held pretty generally on the continent of Europe for a long time. According to Despagnet[2] it was enforced by France as late as 1870; but by that time a newer and less severe doctrine had obtained a considerable hold on the opinion of jurists, especially in Germany.[3] Briefly stated,

[1] C. Robinson, *Admiralty Reports*, vol. I, pp. 196–220.

[2] *Droit International Public*, § 517.

[3] See Westlake, *International Law*, part II, p. 49.

it laid down that, since war no longer placed the general population of the opposing nations in a condition of active hostility, commercial intercourse should be allowed to go on between them except in so far as the necessities of national defence justified its suspension. [What bearing Article 23 (*h*) of the Hague Regulations respecting the Laws and Customs of War on Land, agreed to at the Hague Peace Conference, 1907, has on the topic is doubtful. It forbids "*de déclarer éteints, suspendus, ou non recevables en justice, les droits et actions des nationaux de la partie adverse.*" The British official translation of this is "to declare abolished, suspended or inadmissible the right of the subjects of the hostile party to institute legal proceedings";[1] and other versions are given elsewhere.[2] One of the interpretations of the section (notably that of the Germans) at the Conference was that it prohibited a belligerent from preventing the subjects of his enemy from suing on contract in the tribunals of the other side, and that it therefore reversed the old rule which denied to an enemy subject the right to appear in a court of his country's foe while the war was in progress.[3] But the British and American view was a very different one. It was that the words are merely intended for the guidance of a belligerent commander in occupied territory,[4] and in 1911 the British Foreign Office officially adopted this interpretation.[5] The discussion of the section at the Peace Conference was so inadequate[6] that it was not clearly realized to what the Continental interpretation would have committed Great Britain. For a great deal of legislation by Parliament would have been required to sweep

[1] *Parliamentary Papers. Misc.* No. 6 (1908), p. 55.

[2] [*Ibid.* No. 1 (1908) p. 86. *Supplement to American Journal of International Law*, vol. II, p. 107.]

[3] Report of the First Sitting of the First Sub-Committee of the Second Committee, p. 3. See also *German White Book*, Dec. 6, 1907, p. 7. An illuminating discussion of the whole subject will be found in Higgins, *Hague Peace Conferences*, pp. 263–265.

[4] See §§ 176–180.

[5] Oppenheim, *League of Nations* (1919), pp. 45–55. Holland, *Laws of War on Land*, p. 44. *American Journal of International Law*, vol. II, p. 70.

[6] *Deuxième Conférence Internationale de la Paix. Actes et Documents*, vol. III, p. 14.

away the existing English law and practice.[1] Such was the unsatisfactory lack of agreement when the great war broke out in 1914. Germany, knowing the British pre-war view of Article 23 (*h*), indicated to the British government her intention to suspend enforcement of any British demands against Germans, unless she received within 24 hours an undertaking that German demands against Englishmen would continue to be enforced. No arrangement was reached, and the British interpretation of the section was thus reaffirmed by the British government, and was embodied in *Porter* v. *Freudenberg*[2] by the Court of Appeal who held that an alien enemy, unless he be within the realm by the King's license, cannot sue in the King's courts, but that he can be sued and then, if the decision go against him, he can appeal. This decision, on the face of it, shut the door on any mitigation of the older doctrine of the unenforceability of contracts by an alien enemy during war, and seemed to leave the British doctrine where Lord Stowell left it in *The Hoop* more than a century earlier. Yet, paradoxically enough, the English courts, as the war went on, recognized so many exceptions to the rule that "it is very doubtful whether alien enemies in many other belligerent states enjoyed greater procedural capacity than those in the United Kingdom."[3] For, if resident there, they could sue if they complied with the Aliens Restriction Act, 1914, even though they were interned, or perhaps if they resided in a neutral or allied country, or if they had a license to trade, or were merely nominal co-plaintiffs with a British subject.[4]

So far we have discussed the question whether the subjects of one belligerent can sue or be sued in the courts of the other, and, considering the controversy raised as to Article 23 (*h*), this appears to come within the bounds of International Law. But whether the topic of trading with the enemy does so must be seriously doubted. Every treatise on International Law has

[1] Westlake, *International Law*, vol. I, pp. 49–50, 83–86. Latifi, *Effects of War on Property*, pp. 50–58.

[2] [L. R. [1915] 1 K. B. 857, 874–880.]

[3] [Oppenheim, *International Law*, vol. II, § 100*a*.]

[4] [McNair, *Legal Effects of War*, pp. 54–58.]

something to say on the matter, the British-American view being that war makes such trading unlawful with a few exceptions, while, according to what may be called the Continental view, such trading is not unlawful, unless specially forbidden by a belligerent. [A better recent view seems to be that prohibition or permission is entirely a matter for the discretion of the belligerent state itself.[1] If that be so, it falls within the municipal law of each state, and the rules relating to it should be excluded from books on International Law. But the older doctrine is still asserted,[2] and the exponents of the new theory seem to lack courage in their convictions, for they give the details of the rules adopted by particular states. During the great war, the belligerent states in general forbade their subjects to trade with the enemy.[3]]

## § 144

The effect of war on treaties to which the belligerents and other powers are parties.

We are faced by a number of difficult and complicated questions when we come to consider the effect of war upon treaties to which the belligerents are parties. The only way in which it is possible to deal with them satisfactorily is to adopt the method of analysis; and even so we shall have to confess that with regard to some cases agreement is by no means general or practice uniform. [A suggestion deserving the closest consideration has been made that the true test is to be sought in the intention of the parties, and that if, at the time of making the treaty, the signatories meant it to survive the outbreak of war, it will do so, and otherwise not. If this be so, the rules that follow should be treated as no more than an indication of the probable intention of the parties where none has been expressed or implied in the treaty itself.][4] We will begin by

[1] [Oppenheim, *International Law*, vol. II, § 101. Garner, *International Law and the World War*, vol. I, § 141.]

[2] [*E.g.*, Fauchille, *Droit International Public*, vol. II, § 1060. Hall, *International Law*, 7th ed. § 126.]

[3] [For a good account of the English Law, see McNair, *Legal Effects of War*, ch. IV–VII.]

[4] [Sir Cecil J. B. Hurst in *British Year Book of International Law* (1921–1922), pp. 37–47.]

separating treaties to which other powers besides the belligerents are parties from treaties to which the belligerents only are parties. The first class will at once divide into *great international treaties* and *ordinary treaties*. The latter provide for the everyday business of international intercourse, while the former make epochs in the development of the state system and territorial distribution of parts of the civilized world, or take a wider range and legislate for the society of nations, dealing with questions that affect the condition of a large portion of the human race.

In estimating the effect of war upon great international treaties we must distinguish four cases. The first arises when the cause of the war is quite unconnected with the treaty. Thus in 1866 Prussia and Austria, two signatory powers of the great Treaty of Paris of 1856 which for a time settled the Eastern question, were the chief belligerents in a conflict which arose out of German affairs and had no connection with the Turkish Empire and its dependencies. The Treaty of Paris was entirely untouched by that war, and the rights and obligations of Austria and Prussia under it remained what they were before. In such circumstances a great international treaty is unaffected by the war. The second case occurs when the war does not arise out of the treaty, but operates to hinder the performance of some of its stipulations by the belligerents. France, for instance, when in 1870 she was reeling under the blows of Germany, would not have been able to make good the guarantee of the independence and integrity of the Ottoman Empire into which she had entered with England and Austria in 1856. In such a condition of affairs the obligations it is impossible to fulfil must be held to be suspended for a time and to revive again when the power in question is able to undertake them. If there are other provisions of the treaty, which require merely passive acquiescence and not active support, they continue to bind the crippled state, and the whole treaty remains binding on the other signatory powers, especially when it is directed to purely humanitarian ends, such as the Final Act of the Brussels Conference of 1890 for the suppression of the African slave trade. [But it may well happen that, though the

war does not arise out of the treaty, yet occurrences in the course of it, may make modification or even abrogation of it advisable at the end of the war. Thus Germany lost all her colonial possessions in the course of the great war, including those in Africa, and, after peace was restored, the Final Act of the Brussels Conference, 1890, was abrogated as between many of the belligerent powers who had been parties to it, and who substituted for it the Convention of September, 1919 But the Act still remains in force as regards those of its signatories who took no part in the Convention of 1919.[1] An example of a treaty which required partial modification as the result of events in the same war was the Treaty of Constantinople, 1888, neutralizing the Suez Canal.][2] The third case occurs when the war arises out of the treaty. This happened in 1877, when Russia and Turkey, two of the parties to the Treaty of Paris of 1856, went to war upon the Eastern question. It is very difficult to say what are the legal effects of such action. The chief factor in determining them must be the will of the other signatory powers. In 1877–1878 they remained neutral during the war, but at its close put in a successful claim to be consulted in drawing up the conditions of peace, on the ground that, having allowed the state of affairs established in 1856 to be upset, they were entitled to a voice in shaping the new arrangements which were to take its place. If they had chosen instead to adopt the course of insisting upon the Treaty of Paris and making war against any power that infringed it, they would no doubt have been within their technical right. Or, if the disagreement between the belligerents had related to a small and unimportant point in the treaty, they might have been allowed to settle their quarrel without interference, on the understanding that the other stipulations remained in force unaffected by the war. [The consent of a single neutral power to the abrogation of a treaty, which has led to a war between the other parties to it, may be implied. It seems that this does not apply to the treaties with Holland by which, on April 19, 1839, the great powers guaranteed the neutrality of Belgium. They were abrogated by the recent treaties of peace with Ger-

[1] [See §§ 52, 103.]

[2] [See § 90.]

many (Article 31), whose infraction of Belgium's neutralization had led to the participation of Belgium and Great Britain in the war; with Austria (Article 83), and Hungary (Article 67). Holland, who was neutral in the war, was not a party to any of them. Adequate provision was, however, made for her interests by the stipulation that the conventions to be substituted for the treaties of 1839 should be entered into by the Allied and Associated Powers with the government of Holland as well as with that of Belgium. But the negotiations between Holland and Belgium broke down on a small point and no new convention has been signed. And it would be going too far to say that Holland's consent to the abrogation of the treaties of 1839 must be implied, whatever may be the position of Belgium and other powers with respect to them.] In the fourth place [great international treaties which are intended to operate during war, such as the Hague Conventions, come into active force on its outbreak.]

Ordinary treaties to which one or more powers besides the belligerents are parties, are affected by the war according to their subject-matter. Thus an alliance between three states would be destroyed altogether if war broke out between two of them; a treaty of commerce would cease to operate between the belligerents, but would probably remain in force between each of them and the other states who were parties to it; [hence, the various treaties of peace after the great war definitely specified the multilateral treaties of an economic or technical character, which were to be renewed or applied as between the defeated powers, and such of their former enemies as were parties thereto.][1] A convention with regard to maritime capture would come into operation between the belligerents, and between each of them and the neutral signatory powers.

§ 145

We have now to deal with treaties to which the belligerents only are parties. Considered with reference to the effect of war upon them, they fall [like those discussed in the preced-

[1] [*E.g.* Art. 282 of Treaty of Versailles, 1919.]

ing section into two main classes,—*great international treaties* and *ordinary treaties*. With regard to a great international treaty, if the war be quite unconnected with it, its execution during the war will scarcely be possible, unless it contain provisions expressly applicable to hostilities. In the latter case, it of course comes into active operation; in the former, it seems to be merely suspended until peace is restored. The Institute of International Law, in 1912, adopted rules respecting the effect of war on treaties, and included among those which are destroyed "traités de nature politique." Whatever the meaning of this deliberately vague phrase may be,[1] it appears to be qualified by another article providing that treaties, the execution of which remains possible, ought to be observed subject to the necessities of war. At any rate this was what happened in the great war to the Treaty of Berlin, 1878, which was law-making with respect to Bulgaria, Montenegro, Roumania, and Serbia, and contained a number of other provisions. It had nothing to do with the immediate causes of the war in which sooner or later every signatory to it was engaged. But events occurred in the course of the war which made reconsideration of some parts of the Treaty inevitable when peace was concluded. Bulgaria, Montenegro, Roumania, and Serbia all found their territories, or political existence, or both, greatly affected by the war, and to that extent it was found necessary to amend the Treaty of Berlin. Parts of it had crumbled away even before the great war [2] and a great deal of what was left was extinguished expressly or by necessary implication in the various treaties of peace; but the residue is still in force, and this is indicated by the special mention of some of the provisions which were repealed.[3]]

The effect of war on treaties to which the belligerents only are parties.

[Where the war arises out of the treaty, it is of course in suspense during the conflict, for the very question at issue is

[1] [*Annuaire* (1912), pp. 621, 648.] [2] [See § 134.]

[3] [See Treaty of Peace with Germany, Art. 280, 282–295; with Austria, Art. 234–247; with Hungary, Art. 217–230; with Turkey (unratified), Art. 269–280. Cf. recital in Treaty of 10th Sept. 1919 with Serb-Croat-Slovene State. *History of Peace Conference*, vol. v, p. 447.]

whether it is to be binding or not; and it is almost inconceivable that the treaty of peace will not make a rearrangement of the original pact. Thus, Great Britain joined in the great war because Germany violated the neutrality of Belgium guaranteed by Great Britain, Austria, France, Prussia, and Russia in Article 1 of the Treaty of London concluded with Belgium on 19th April, 1839, and identical in terms with the treaty made with Holland on the same date, to which reference has already been made.[1] The other signatories to the treaty had all become parties to the war before this, but (except of course in the case of Belgium) on grounds unconnected with the Treaty of London. By the treaties of peace with Germany, Austria, and Hungary, these powers consented to the abrogation of this treaty, and undertook immediately to recognize and to observe whatever conventions might be entered into by the Principal Allied and Associated Powers, or by any of them, in concert with the governments of Belgium and of the Netherlands, to replace it.]

[The second class of treaties to which we referred—ordinary treaties—may be subdivided into four classes.] In the first we may put those to which the ambiguous name of *pacta transitoria* has been given. This phrase does not refer to engagements the force of which passes away in a short space of time, such as an agreement to send a joint punitive expedition against some savage tribe, but to treaties which, though they may be fulfilled by one act or series of acts, set up a permanent state of things. Boundary conventions and treaties of cession or recognition are examples. War has no effect upon them. They remain unchanged in spite of it. For example, the boundaries between belligerent states may be readjusted in consequence of a war; but till the readjustment is effected by the treaty of peace or by completed conquest, the old territorial distribution remains legally in force. The next class is made up of treaties of alliance, and conventions binding generally to friendship and amity. It is clear that they are entirely destroyed by the war. In the third class we may place conventions for regulating ordinary

[1] [Hertslet, *Map of Europe by Treaty*, vol. II, pp. 979, 997.]

social, political, and commercial intercourse, such as treaties of commerce and extradition treaties. The effect of war upon instruments of this kind is very doubtful. They are, of course, suspended while the war lasts; but it is a much-disputed question whether they revive again at the conclusion of peace, or are destroyed by the war and require to be reënacted if they are to come into force again when it is over. The practice of states exhibits a lamentable absence of uniformity. Some treaties of peace expressly stipulate for the revival of postal and commercial agreements subsisting before the war, the inference being that the stipulation was necessary to give force to the revived arrangements. Other treaties contain no covenant for revival, and yet under such circumstances agreements of the kind we are considering have been acted upon after the peace on the understanding that they were restored to efficiency by it.[1] In judicial decisions we [perhaps] find a nearer approach to a fixed rule.[2] With these facts before us we may venture to say that, though no rule can be laid down as undoubted law, it is best to hold on general principles that treaties of the kind we are now considering are merely suspended by war and revive at the conclusion of peace, unless the parties expressly annul them or substitute other arrangements for them. The fourth and last class contains treaties which regulate the conduct of the contracting parties towards each other when they are belligerents, or when one is a belligerent and the other is neutral. Cases in point are afforded by the numerous agreements giving to the subjects of each of the contracting powers the right to remain in the territory of the other should the two countries be at war, and by stipulations for the regulation of maritime capture. The effect of war on all treaties of this class is to bring them into active operation.

[The treaties of peace after the great war adopted the simple plan of requiring each Allied or Associated Power to notify to its beaten foe such of its bilateral treaties as it wished to revive.]

[1] Hall, *International Law*, 7th ed., § 125.

[2] *Society for Propagation of Gospel* v. *Town of Newhaven*. Wheaton, *Reports of U. S. Supreme Court*, vol. VIII, p. 494. *Sutton* v. *Sutton* (1830) 1 Russell & Mylne, 663.

What has been said above applies not only to whole treaties, but also to separate stipulations in treaties dealing with several subjects.[1]

§ 146

[This section consisted of a table epitomizing the conclusions in § 145. But so many alterations were needed in § 145, that the corresponding amendments in the table would have made it too unwieldy for an epitome unless accuracy had been sacrificed to brevity. It has therefore been omitted.]

[1] [On the topic generally, see Phillipson, *Termination of War*, pp. 250–268.]

## CHAPTER II

### THE ACQUISITION BY PERSONS AND PROPERTY OF ENEMY CHARACTER

### § 147

Enemy character, and the extent to which individuals possess it.

Enemy character is a quality possessed in a greater or less measure by persons and things. It is by no means constant; but may be likened to a taint which in some cases is powerful, in others weak, and may be of any degree of strength between the two extremes. Some persons are enemies in the fullest sense of the word; that is to say they may be killed by the public armed forces of the state. Others are enemies only in the sense that a certain limited portion of their property may be subjected to the severities of warfare. And it is the same with things. Sometimes they are enemy property in the sense that they may be captured wherever it is lawful to carry on hostilities: sometimes they may be taken only under very special circumstances. We will endeavor to arrange both enemy persons and enemy property in an ascending and descending scale, according to the degree in which the hostile character is impressed upon them.

### § 148

First among those individuals who may be regarded as enemies we must place

*Persons found in the military or naval service of the enemy state.*

Persons enrolled in the enemy's fighting forces.

These are enemies to the fullest extent. They may be killed or wounded in fair fight according to the laws of war, and, if captured, may be held as prisoners of war. Their nationality makes no difference in this respect. If any of them are neutral subjects, they can claim no immunities on that account. As

was definitely stated in the fifth Convention of the last Hague Conference, they are free from special severities, but subject to the ordinary risks and incidents of civilized warfare.[1] Enrolment in the public armed forces of a belligerent puts them as regards the enemy in the same position as their comrades who are subjects of the state for which they are fighting. Modern warfare provides constant illustrations of this rule, especially when neutral opinion runs strong in favor of one side in the struggle. For instance, in the Boer War of 1899–1902 large numbers of foreigners joined the forces of the Dutch republics, and were treated by the British as lawful combatants [and the great war also supplied many examples]. The only exception to this humane custom occurs when a state finds subjects of its own fighting against it in the ranks of its foes. It would then have the right, should it capture them, to execute them as traitors, instead of treating them as prisoners of war.

But nevertheless difficulties may arise in some cases. If the enlistment of neutral subjects is purely voluntary, the belligerent who suffers from it may complain to the state whence they came. The question of the responsibility of their mother country is settled by the law of neutrality, and will be discussed when we deal with that portion of our subject. If the enlistment is involuntary, the persons compelled to serve being foreigners resident in the territory of the belligerent that exercises compulsion over them, their government would have good ground of complaint should the force into which they have been drafted be the regular army. This would mean that the aliens in question were liable to be used for the political purposes of the state that had obtained possession of their services. The question whether they may be forcibly enrolled in the militia or national guard is not so clear. In the American Civil War Great Britain seemed content that her subjects domiciled in the United States should serve in the local militia, and in one case, that of Scott, she declined to interfere with an

[1] British Parliamentary Papers, *Miscellaneous*, No. 6 (1908), p. 66; Whittuck, *International Documents*, p. 147; *Supplement to the American Journal of International Law*, vol. II, pp. 122, 123.

order to join the active army.[1] But Scott had declared his intention of becoming a naturalized American subject, and of adhering to the United States if war had broken out at the time of the Trent affair; and probably it was thought that a citizen whose allegiance sat so lightly upon him had little claim for consideration from his native state. Certain it is that a vigorous protest was addressed to the government of the Southern Confederacy against its practice of regarding British subjects domiciled within its territory as liable to conscription. Moreover, one of the grievances that helped to bring about the Boer War was the habit of the South African Republic of endeavoring to "commandeer" for military service the "outlanders" to whom it denied citizenship. There is a clear distinction between the maintenance of social order, which may well be required of every one who lives under the protection of the local laws, and the furtherance of political ends, which ought to be asked only of those who are members of the body politic. The recognition of this principle would lead in practice to the rule that foreigners resident in the country might be required to serve in any local force raised for defending life and property against the enemies of society, but could not be compelled to serve in the army or militia.[2] Any state might without offence declare that it would insist upon the application of this rule to its subjects domiciled abroad. There are, in fact, various treaties in existence whereby the contracting powers provide that their subjects domiciled in each other's territory shall not be called upon for war services. The Commercial Treaty of 1871 between the United States and Italy contains stipulations to that effect,[3] and, among the leading powers of Europe, Great Britain, France, and Russia have been parties to such agreements. It is hardly possible to say that the rule in question is part of the common law of nations; but it seems in a fair way to become so, since opinion and practice are turning strongly in its favor.

[1] Halleck, *International Law*, Baker's 4th ed., vol. 1, p. 558, note.
[2] Hall, *International Law*, 7th ed., § 61.
[3] *Treaties of the United States*, p. 582.

§ 149

The next class of enemies is composed of

*Seamen navigating the merchant vessels of the enemy state.*

Crews of the merchant vessels of the enemy.

They differ from ordinary combatants in that they may not attack the enemy of their own initiative, and from ordinary non-combatants in that they may fight to defend their vessel if it is attacked by the enemy. They, therefore, occupy a position midway between the fighting forces and the civilian population. Till 1907 they might be held as prisoners of war when their vessel was captured, no matter whether they offered resistance or made a quiet surrender. But the Hague Conference of that year, in its Convention relative to certain Restrictions on the Exercise of the Right of Capture in Maritime War, freed them from liability to be kept in captivity, if they would make a formal promise in writing not to undertake during the war any service connected with its operations. Should they be subjects of a neutral state, they must be set at liberty unconditionally, except that officers of neutral nationality are required to promise in writing not to serve again on an enemy ship during the continuance of hostilities. These immunities, which the Japanese largely anticipated in their war of 1904–1905 with Russia,[1] are made to depend on a peaceful delivery of the vessel. Resistance would, of course, deprive those who made it of freedom from capture as prisoners of war.[2] Should the crew of a belligerent merchantman make an unprovoked attack on a vessel of the enemy, they would be liable now, as of old, to the severities exercised against non-combatants who perform hostile acts. [But an act does not become an unprovoked attack when it anticipates the known and deliberate breach of the laws of war by a belligerent. In the great war, German submarines persistently attempted to sink at sight

[1] Takahashi, *International Law Applied to the Russo-Japanese War*, pp. 138, 139.

[2] British Parliamentary Papers, *Miscellaneous*, No. 6 (1908), p. 98; Whittuck, *International Documents*, 185, 186; *Supplement to the American Journal of International Law*, vol. II, pp. 170, 171; Higgins, *The Hague Peace Conferences*, pp. 397, 398.

merchant ships without making any provision for the safety of the passengers or crews. The masters of such ships therefore, as a counter-measure, tried to ram submarines, and Fryatt, the captain of an unarmed British merchantman, was captured after an unsuccessful endeavor to do this. He was executed by the German authorities after a hurried and apparently secret trial. It is enough to say of this proceeding that it was described by a jurist of a state then neutral as "without warrant in International Law and illegal," and by two dissenting members of a German commission appointed to inquire into the matter as an "unpardonable judicial murder."][1]

## § 150

Travelling down the scale, we now come to

*Followers of an army such as contractors, newspaper correspondents, sutlers, etc.*

Those who follow an army without directly belonging to it.

There are numerous persons who, in the words of Article XIII of the Hague Regulations respecting the Laws and Customs of War on Land,[2] "follow an army without directly belonging to it." The Article goes on to mention "newspaper correspondents and reporters, sutlers and contractors," but only as examples. It makes no attempt to give a complete list; and we can see at once that many classes of persons besides those enumerated come within the terms of the general description. Members of a royal family who took the field would as a rule hold military rank; but it is conceivable that a prince who had never entered the army might nevertheless accompany it in the crisis of a campaign. A minister of state, too, might find himself on a battlefield, though in ordinary life he was the most peaceful of civilians. All these exalted personages would

[1] [*American Journal of International Law*, vol. x, p. 877. Garner, *International Law and the World War*, vol. i, p. 413 *n*. Higgins, *Defensively-armed Merchant Ships* (1917).]

[2] British Parliamentary Papers, *Miscellaneous*, No. 6 (1908), p. 53; Whittuck, *International Documents*, p. 132; *Supplement to the American Journal of International Law*, vol. ii, p. 102; Higgins, *The Hague Peace Conferences*, p. 227.

be following the army without directly belonging to it, as truly as the meanest peddler who sold fruit and sweetmeats to the soldiers. They would therefore be liable to detention if they fell into the enemy's hands. He would keep them or free them at his discretion. But Article XIII of the Hague Regulations stipulates that, if they are detained, they "are entitled to be treated as prisoners of war, provided that they are in possession of a certificate from the military authorities of the army they were accompanying." This last proviso was made to fit the case of such persons as foreign attachés or newspaper correspondents, who have no business to be with an army at all unless they have obtained special permission to accompany it. It is hardly applicable to prime ministers or petty traders, who are respectively too great and too humble to need formal certificates. We may safely say that any non-military persons who are detained must be treated with humanity, and those of them who cannot be regarded as undesirables to be got rid of as soon as possible, are entitled to the consideration due to prisoners of war.[1] [A newspaper correspondent, who uses wireless telegraphy for the transmission of messages from a neutral ship, is not a spy, and the threat of Russia during the Russo-Japanese War, 1904, to treat him as such was unjustifiable.][2]

§ 151

Another class possessing the enemy character in some degree is composed of

*Persons living in an enemy country.*

But though they must be reckoned as enemies, they are not hostile to such an extent that they may be slain, or even made prisoners, as long as they live quietly and take no part in the conflict, direct or indirect. When two civilized states are at war, the residents in the territory of each will almost invariably include a considerable number of neutral subjects, and sometimes a few enemy subjects as well. These people must of necessity increase the resources of the country by the taxes they pay, and the growth of wealth

Persons living in an enemy country.

[1] See § 164. [2] [See Higgins, *War and the Private Citizen*, pp. 91–112.]

due to any trading operations they may carry on successfully. It seems to follow that should the district they live in be invaded by the other belligerent, he is at liberty to impose on them, as well as on the subjects of his enemy, such burdens as may be lawfully exacted from districts under military occupation. These include the payment of contributions and requisitions, and the performance of certain personal services, but exclude plunder and personal injury.[1] [The German attempt at the Hague Conference, 1907, to obtain modification of the rule as to contributions and requisitions was unsuccessful,[2] though it produced the expression of a unanimous wish by the plenipotentiaries] "that the Powers should regulate, by special treaties, the position, as regards military charges, of foreigners residing within their territories." [3]

Hitherto we have considered the case of residents in the enemy's territory in so far as they are affected by war on land. We must now deal with their position as regards war at sea. The national character of ships is determined by the flag they are entitled to fly [except where it is used as a mere blind] [4]; but when cargoes are seized in circumstances that justify the capture of enemy property and yet give no right to confiscate the property of neutrals, the question immediately arises whether the owners are to be regarded as enemies if they reside in enemy territory or as neutrals if in addition they possess neutral nationality. Should they be both residents on enemy soil and subjects of the enemy state, no other position than that of enemies can by any possibility be assigned to them. But if residence points in one direction and national character in another, which is to prevail? The answer of the school of thought dominant on the continent of Europe is short and simple. It adheres to nationality as the test. But the English-speaking powers have adopted the opposite view.

[1] See § 180.

[2] Deuxième Conférence Internationale de la Paix. *Actes et Documents*, vol. I, pp. 148–159, 176–179.

[3] British Parliamentary Papers, *Miscellaneous*, No. 6 (1808), p. 15; Whittuck, *International Documents*, p. 88; *Supplement to the American Journal of International Law*, vol. II, p. 27; Higgins, *The Hague Peace Conferences*, p. 69.

[4] [See § 181.]

British and American judges have laboriously built up a great body of law, based upon the proposition that such a residence in an enemy's country as adds the resources of the individual to the common stock of strength for war possessed by the hostile state, stamps the enemy character upon him. They have applied the principles of the law of domicile to questions of maritime capture, and in doing so have modified them to some extent in order to secure substantial justice for all concerned. It would be difficult to deny that they have succeeded in their endeavor, and equally difficult to maintain that the rules they have elaborated are distinguished by the simplicity that characterizes the opposing doctrine. We shall give the outline of their system a little further on.[1] Here it will be sufficient to repeat that its essence is the adoption of residence, understood in a special sense, as the test of hostile or friendly character.

The conflict between the two views, which may be called for shortness the British and the Continental, was definitely raised at the Naval Conference of 1908–1909.[2] No great difficulty was experienced in reaching the unanimous conclusion that "the neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner."[3] But the division of opinion as to the proper method of determining the character of the owner was so marked and persistent that no decision was possible.

§ 152

Our next class of enemies is tainted with the hostile character to a very small degree only according to the theory of domicile, and not at all according to the theory of nationality. It consists of

*Persons living in places held by the enemy merely as military occupant.*

These a state may regard as enemies to the extent of subjecting to hostile capture their property proceeding from the

[1] See § 154.

[2] See § 32.

[3] British Parliamentary Papers, *Miscellaneous*, No. 4 (1909), pp. 61, 88, 100; *Supplement to the American Journal of International Law*, vol. III, p. 214.

places in question, even though they are parts of its own territory. Being under enemy occupation, their possession enriches the enemy for the time being and contributes to his warlike resources, while their own country reaps no advantage from them. They are, therefore, liable, while the occupation lasts, to the severities exercised in war against the property of non-combatant subjects of the enemy state. But if the hostile occupants are dispossessed, the inhabitants are, of course, treated as citizens and not as residents in enemy territory. During the Civil War in the United States the courts regarded places in the firm possession of the Southern Confederacy as enemy territory, and the property of persons domiciled therein as enemy property in so far as the rules of warlike capture were concerned.[1] But it should be remembered that there are British decisions that point to cession or completed conquest, rather than mere occupation in the military sense, as necessary before the territory can be considered hostile to such an extent as to justify the capture and condemnation of property proceeding from it;[2] [and the action taken by the British executive in the great war points in the same direction, for it issued a Proclamation that the orders relating to trading with the enemy should apply to territory in hostile occupation as they applied to an enemy country; and no such Proclamation would have been necessary if there had been a previous Common Law rule to the same effect. Moreover the courts construed the Proclamation so narrowly that a fresh one was necessary, making it clear that corporations carrying on business in occupied territory fell under the ban of trading with the enemy.[3] On the other hand, territory in the non-hostile military occupation of a belligerent has been regarded by the British courts as part of the occupant's territory for the purposes of war. Such was the position of Egypt which, before the outbreak of war with

Residents in places under the military occupation of the enemy.

[1] Wheaton, *International Law* (Dana's ed.), note 160.

[2] Westlake, *International Law*, part II, pp. 168–169.

[3] [*Central India etc. Co. Ld.* v. *Société. etc. Anversoise.* L. R. [1920] 1 K. B. 753. *Société Anonyme Belge des Mines d'Aljustrel* v. *Anglo-Belgian Agency, Ld.* L. R. [1915] 2 Ch. 409. Hall, *International Law*, 7th ed., p. 542 *n.*]

Turkey, in 1914, was in the friendly military occupation of Great Britain, and was therefore hostile territory with regard to Germany.][1]

§ 153

Lastly, if domicile be taken as the test, the enemy character is possessed in an appreciable degree, as far as property is concerned, by

*Neutral subjects who have houses of trade in the enemy's country, though they do not reside there.*

Neutrals who have houses of trade in the enemy's country.

They are said to have acquired in this way a trade domicile in war which is quite independent of their personal residence, and exposes the goods connected with it to the risk of capture, on the principle that the enemy country has its resources for war increased by the trade done in it, even though the trader himself is a neutral subject and lives in neutral territory. The result was tersely put by Lord Stowell in the case of the *Vigilantia*, when he referred with approval to the rule "that if a person entered into a house of trade in the enemy's country, in time of war, or continued that connection during the war, he should not protect himself by mere residence in a neutral country."[2] The liability to capture does not, however, extend to other goods belonging to the same owner but unconnected with the hostile trading establishment.

§ 154

British and American theory of domicile in relation to questions of belligerent capture.

We see by the foregoing list of those who are technically enemies that citizenship and domicile are the two great tests of hostile character, but that other circumstances, such as being temporarily or permanently in the enemy's service, or residing in a district occupied by him, or having a house of trade in his country, are taken into consideration, and are held to taint the individual concerned to a greater or less degree.

[1] [*The Gutenfels*. L. R. [1916] 2 A. C. 112, 118. Cf. *The Gerasimo* (1857) 11 Moore P. C. 88, 96 (Territory temporarily seized as a mode of redress falling short of war remains national territory).]

[2] C. Robinson, *Admiralty Reports*, vol. I, p. 15.

According to British and American practice, domicile modifies to a great extent the rules based on nationality. It is necessary, therefore, to inquire what kind of residence amounts in law to domicile, and how far liability to the severities of war is affected thereby. Fortunately there are in existence a number of decisions on these points by great prize court judges both in England and in the United States, and we are able to gather from them a body of clear and consistent doctrine. Domicile is determined by the intent of the parties and by the length of their residence. If the intent to go to a certain place and live there is perfectly clear, a domicile therein is acquired as soon as residence commences. If the intent is not clear, long-continued residence will create a domicile; and an intent to make a short stay in a place and then return is held to be overridden by remaining there a long time and treating the place as a home. In every case where a man is a citizen of one country and has his home in another, the liability of his property connected with the latter country to capture and other incidents of warfare is determined by domicile and not by nationality. If the country of his domicile be neutral, he has a neutral character in so far as his property connected with that country is concerned; if it be belligerent, he has a belligerent character which renders his property connected with it enemy property to the other belligerent. But any property which he may possess in the country of his citizenship and allegiance follows the condition of that country as neutral or belligerent. And further, for purposes of capture at sea in time of war, a man may have two or more domiciles, one at least of which is unconnected with actual residence; for he may live in one country and have a house of trade, or a share as partner in a house of trade, in another country, or in several other countries. In such a case goods connected with any house of trade in an enemy country would be regarded as enemy goods, and held liable to capture in circumstances that justify the seizure of such property. [Hence, the share of a neutral American citizen in goods belonging to a German firm, of which he was a partner, was condemned by the British Prize Court during the great war. For, although he resided in the United

States (then neutral) where he was in charge of a branch of the firm's business, yet the head office was in Germany, and there was nothing to show that the goods appertained to the American branch, and not to the German.[1] Moreover, his share would have been equally confiscable if he had been an enemy subject domiciled in an enemy country, though the partnership business were carried on in a neutral country, for there would still be a sufficient hostile connection to warrant a belligerent in taking the property *jure belli*.][2]

The effect of intent in creating a domicile of choice was stated by Lord Camden in his judgment on the case of the non-Dutch subjects who were found by Admiral Rodney in the island of St. Eustatius when the British took it from the Dutch in 1781. With regard to those who meant to remain there, he laid down that "they ought to be considered resident subjects" of the republic of the United Netherlands; and he applied this rule to the case of Mr. Whitehill, a natural-born British subject, who had arrived in the island only a few hours before the British fleet attacked it, but was shown to have intended to take up his permanent residence therein.[3] In the case of the *Harmony* the influence of time upon domicile was exhaustively considered in a judgment delivered by Lord Stowell. The vessel was an American merchantman which had been brought in for adjudication by a British cruiser in the war between Great Britain and France at the end of the eighteenth century, on the ground that the cargo consisted of enemy goods. The partners of a house of trade in the United States claimed a portion of it as belonging to them, and therefore neutral property. Restitution was decreed with regard to the share of the partners residing in the United States; but in 1800 Lord Stowell decided against another partner, Mr. G. W. Murray, on the ground that he was residing in France, the country of the enemy. Murray had travelled from the United States to France to look after the business of the firm in that country; but he had remained in France for four years

[1] [*The Anglo-Mexican*. L. R. [1918] A. C. 422. *The Lützow*. *Ibid*. 435.]
[2] [*The Clan Grant* (1915) 1 British and Colonial Prize Cases, 272.]
[3] Wheaton, *International Law*, § 321.

together, and, though it was clear that he intended to return to America, where he had a wife and child, there was also evidence to show that he purposed to come back again to Europe. Upon these facts Lord Stowell laid down that "a special purpose may lead a man to a country where it shall detain him the whole of his life . . . against such a long residence, the plea of an original special purpose could not be avowed." He continued, "Suppose a man comes into a belligerent country at or before the beginning of the war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing by the payment of taxes, and other means, to the strength of that country, he could not plead his special purpose with any effect against the rights of hostility."[1] These cases clearly show that time and intent are the two great elements in determining domicile.

In cases of acquired domicile original character easily reverts. In order that it may do so, nothing more is necessary than that the person domiciled abroad should set out on his return journey to his native country, intending to take up his abode there. Thus in 1800, in the case of the *Indian Chief*, Lord Stowell restored the property of Mr. Johnson, a citizen of the United States domiciled in England. It had been captured because it was engaged in a traffic prohibited to British subjects but allowed to neutral American citizens. But on proof that at the time of capture Mr. Johnson had left England on his way to the United States with the intention of remaining there, Lord Stowell decided that he had lost his domicile of choice and regained his domicile of origin. "The character," said the judge, "that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to him from the moment that he puts himself in motion *bona fide* to quit the country *sine animo revertendi*."[2]

[1] C. Robinson, *Admiralty Reports*, vol. II, pp. 324, 325; Scott, *Cases on International Law*, pp. 585–588.

[2] C. Robinson, *ibid.*, vol. III, pp. 20, 21; Scott, *ibid.* pp. 588–591.

These principles of the British tribunals were deliberately adopted by the Supreme Court of the United States in the case of the *Venus*,[1] which arose during the War of 1812–1814 between the two countries. They are indeed the common property of the two great English-speaking powers, though most European nations reject the doctrine of domicile on which they are founded.

[It is convenient to make a brief reference here to the position of trading corporations in time of war. The difficulty with respect to them is to choose between two competing principles. One is that a corporation is a person (whether real or fictitious need not be discussed here) quite distinct from the human beings who are members of it. The other is that a state in time of war must, for its own safety, have a free hand in preventing trade with the enemy. On the first of these principles, a trading company incorporated in England, but composed entirely of enemy subjects resident in an enemy country, should be reckoned as an English corporation, and should be disturbed by the war no more than any other British subject. On the second principle, what is a mere fiction of the law should be swept aside when it conflicts with national safety, and the company should be treated as an enemy person. This, in fact, would do little injustice to the first principle, the exact limits of which in relation to modern warfare had not been worked out before the great war. After some hesitation, the English executive and judicature adopted in effect the second view. In *Daimler Co. Ld.* v. *Continental Tyre & Rubber Co. Ld.*,[2] every share in an English company, except one, was owned by German enemies, and every director and officer of the company, except one, was a German enemy. The House of Lords held in 1916 that the burden of proving that the company was not an enemy one was thrown on the company. It was pointed out that the material question was rather, "Who controlled the affairs of the company?" than "Where was the company incorporated?" The American

[1] Cranch, *Reports of U. S. Supreme Court*, vol. VIII, pp. 253–317; Scott, *Cases on International Law*, pp. 591–597.

[2] [L. R. [1916] 2 A. C. 307.]

courts did not go the length of the British view; the French Cour de Cassation and Prize Court did.] [1]

§ 155

Enemy character and the extent to which property possesses it. Property of the enemy state.

We have now to consider how the enemy character is acquired by property. To some extent we have already dealt with this subject incidentally while discussing enemy persons; but we shall find that it is susceptible of separate treatment, and that a classification can be made of the various kinds of property marked by the hostile taint. Enemy property comprises first

*Property belonging to the enemy state.*

Such things as the public armed vessels of the enemy, his guns and munitions of war, are of a preëminently hostile character, and may be taken in all places where it is lawful to carry on warlike operations; but, as we shall see in the future,[2] there are other kinds of property belonging to the enemy state which are wholly or partially exempt from confiscation.

§ 156

Next comes

*Property belonging to subjects of the enemy state.*

But we must remember that if this is connected with a neutral domicile acquired by its owner, it is accounted neutral by those who take domicile as the test of hostile or friendly character, and remains in their view free from hostile seizure. On land the property of enemy subjects is exempt from capture as a general rule, to which, however, there are many exceptions.[3]

With regard to property at sea, it often happens that the enemy owners of merchantmen entitled to fly the enemy flag endeavor at the outbreak of war, or even in anticipation of

[1] [Oppenheim, *International Law*, vol. II § 88*a*. Hall, *International Law*, 7th ed., p. 528. Garner, *International Law and the World War*, vol. I, §§ 146–154.]

[2] See §§ 170, 174, 177.

[3] See §§ 179, 180.

it, to transfer their vessels to neutrals in order that the neutral flag may protect them from capture, and sometimes these transfers are merely colorable. Belligerents are therefore obliged to take precautions against evasion of their rights. The rules laid down by maritime powers in order to effect this purpose proceeded on similar lines, but did not agree in every particular. The subject was, therefore, discussed at the Naval Conference of 1908–1909 with a view to bringing about uniformity; and a unanimous agreement was reached. Its terms are embodied in Articles 55 and 56 of the Declaration of London. A distinction is drawn between transfers effected to a neutral flag after the outbreak of hostilities and such transfers effected before the war began. In the first case it is presumed that the transfer is void; but this presumption may be upset by proof that it "was not made in order to evade the consequences to which an enemy vessel, as such, is exposed." The right to tender such proof ceases, however, "if the transfer has been made during a voyage or in a blockaded port," or, "if a right to repurchase or recover the vessel is reserved to the vendor," or "if the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled." [Art. 56.]

The property of enemy subjects.

In the case of transfer effected before the declaration of war, it is legally presumed to be valid, unless it is proved by the captors that the transfer "was made in order to evade the consequences to which an enemy vessel, as such, is exposed." If she has been divested of her belligerent nationality less than sixty days before the outbreak of hostilities and does not carry the bill of sale a presumption (which can be rebutted) arises that the transfer is void; in other words, the burden of proof shifts to the transferee of the ship, who must show that the transfer was in good faith. Should the transfer have taken place more than thirty days before the commencement of the war, it is regarded as valid, even though it may have been made to avoid the chance of belligerent capture, unless the captor can show that it is conditional, incomplete, irregular according to the laws of the countries concerned, or so arranged as to leave to the vendor the control of the vessel or the profits

arising from her employment. But when the transaction is completed more than thirty and less than sixty days before the war began, the vessel may be captured if the bill of sale is not on board, and even if in all other respects the transfer is unexceptionable, and the prize court releases her accordingly, she cannot claim compensation, since the absence of the document made her justly suspect.[1] (Article 55.) [On the outbreak of the great war, the British and French governments adopted the Declaration of London (though it had never been ratified) with modifications which did not affect Articles 55 and 56, and the rules laid down in them were applied in several decisions.[2] The Declaration was abandoned by these powers in July, 1916, but that did not imply abrogation of particular rules in it which represented practice before the making of the Declaration. It was held in *The Edna*[3] that Article 56 is probably designed only to deal with colorable or fictitious transfers after the outbreak of war devised by both parties in combination, but that if it required the transferee to prove that the transferor did not make the alienation for the purpose of evading capture, then it was too harsh for British practice which would infer good faith if the alienation were an out-and-out one.[4] It is clear from the same case and from others previously decided that a transfer of a warship to a neutral will not save her from capture and that the Declaration of London would not apply to public ships.][5]

As to cargoes the Naval Conference of 1908–1909 decided that the neutral or enemy character of the goods that compose them was determined by the neutral or enemy character

[1] British Parliamentary Papers, *Miscellaneous*, No. 4 (1909), pp. 58, 59, 87, 88, 99, 100; Higgins, *The Hague Peace Conferences*, pp. 559, 560, 600–602; *Supplement to the American Journal of International Law*, vol. III, pp. 212–214. [Bentwich, *Declaration of London*, ch. v.]

[2] [*The Tommi*. L. R. [1914] P. 251. *The Dacia* (1915) *Revue Générale de Droit International Public*, vol. XXII (*Jurisprudence*), p. 83. *American Journal of International Law*, vol. IX, p. 1015.]

[3] [L. R. [1921] A. C. 735.]

[4] [*The Ariel* (1857), 11 Moore P. C. 119, 129.]

[5] [Oppenheim, *International Law*, vol. II, § 91. Hall, *International Law*, 7th ed., p. 638 *n*. *American Journal of International Law*, vol. IX, p. 195.]

of their owners.[1] In time of peace goods once loaded on board a vessel belong to the consignee as a general rule, which may, however, be reversed by special agreement. But in war, if the consignee is an enemy, no special agreement can divest him of his proprietary rights in them from the moment they are ready to start on their voyage.[2] If, however, he is neutral, proof may be required that he, and not the enemy consignor, is the real owner. The presumption is that the cargo of an enemy vessel consists of enemy goods, but it may be rebutted by evidence to the contrary.[3] [In the great war, the British and French governments adopted these rules until the abrogation of the Declaration of London in July, 1916, to which we have just referred No decisions in which these Articles were applied appear to have been reported, but the Declaration of London did not affect existing practice on this point.]

§ 157

The next kind of property to be considered is

*Property owned by neutrals, but incorporated in enemy commerce or subject to enemy control.*

A ship chartered by the enemy, or navigated by an enemy captain and crew would be treated as enemy property, even though she belonged to a neutral owner, and the same fate would befall a neutral ship habitually sailing under the enemy's flag or taking a pass or license from the enemy. It is still doubtful what would be the fate of neutral ships engaged in a trade which before the war had been reserved by the enemy for his own merchantmen, but was thrown open by his government during the war or in anticipation of it. Great Britain has, under what is called her Rule of War of 1756, claimed the right to regard such vessels as enemy vessels, and at the Naval Conference she supported a German proposal to insert in the Declaration of London a rule embodying her view. The attempt was, however, foiled by the strong opposition of the

Neutral property incorporated in enemy commerce or subject to enemy control.

[1] *Declaration of London*, Art. 58.

[2] *Ibid.*, Art. 60.

[3] *Ibid.*, Art. 59.

United States and several other powers. The matter is, therefore, left open.[1]

There can be no doubt that neutral goods laden on board a public armed vessel of the enemy forfeit their neutral character and become liable to capture as enemy property. But if they are laden on board an armed enemy merchantman their position is not clearly defined. In 1814 Lord Stowell decided in the case of the *Fanny* that the fact of being found on board an enemy vessel armed to resist attack was conclusive against the goods.[2] But in 1815 the Supreme Court of the United States took the contrary view in the case of the *Nereide*, and held that unless the neutral owner took part in the armament or the resistance, his goods were not liable to forfeiture.[3] Judge Story, however, supported the English view and delivered an elaborate dissenting judgment. It appears, therefore, that there is a slight balance of authority in favor of the stricter rule, which seems on principle to be the better of the two, for it is difficult to see what other object the neutral owner could have had in view, when he selected an armed enemy merchantman as the vehicle for his goods, than to profit by her force in order to defeat the search and capture of her enemy.

§ 158

The last kind of enemy property to be considered may be defined as

*The produce of estates owned by neutrals in belligerent territory or in places in the military occupation of the enemy, as long as it remains the property of the owner of the soil.*

Such property is regarded as enemy property according to what we may term the British and American view, even though the neutral owners reside in their own neutral coun-

[1] *Declaration of London*, Art. 57; British Parliamentary Papers, *Miscellaneous*, No. 4 (1909), p. 100, and *Miscellaneous*, No. 5 (1909), p. 247; Article by Admiral Stockton, *American Journal of International Law*, vol. III, pp. 610, 611. [Higgins, *War and the Private Citizen*, pp. 169–172.]

[2] C. Dodson, *Admiralty Reports*, vol. I, pp. 443–449.

[3] Cranch, *Reports of U. S. Supreme Court*, pp. 388–455; Scott, *Cases on International Law*, pp. 884–894.

try. The point was fully discussed and decided by the Supreme Court of the United States in the case of the *Thirty Hogsheads of Sugar*, which occurred in the war of 1812–1814.

The produce of estates owned by neutrals in places under enemy control, while it belongs to the owner of the soil.

An American privateer captured a cargo of sugar proceeding in a British vessel from the Danish island of Santa Cruz to a commercial house in London at the risk of its owner, the proprietor of the estate whence it came. Denmark was an ally of France, and Great Britain was at one and the same time engaged in waging war on them and carrying on a separate war on different grounds with the United States. In the course of her war with Denmark she had captured the island of Santa Cruz and held it under her belligerent occupation. Denmark was neutral in the war between Great Britain and the United States; and the proprietor of the sugar, Adrian Benjamin Bentzon, was a Danish subject who had left Santa Cruz and was living in Denmark. But the Supreme Court condemned the sugar on the ground that it was the produce of a place that must be considered for purposes of war as belligerent territory, and was when captured the property of the owner of that place.[1] [The British view is the same as the American, so far as the produce is that of belligerent soil;[2] but our courts do not hold that soil is necessarily belligerent because it is in the military occupation—hostile or otherwise—of the enemy.][3]

## § 159

Summary of the circumstances under which the enemy character is acquired by property.

We are now in a position to answer the question, How does property acquire the enemy character? Its legal condition is determined sometimes by the nationality of the owner and sometimes by his domicile, sometimes by the character of the place from which the property comes, and sometimes by the nature of the control exercised over it. There re-

[1] Cranch, *Reports of U. S. Supreme Court*, vol. IX, pp. 195–199; Scott, *Cases on International Law*, pp. 598–601.

[2] [*The Phoenix* (1803). C. Robinson, Admiralty Reports, vol. v, p. 20. *The Asturian*. L. R. [1916] P. 150.]

[3] [See § 152.]

mains, however, a difficulty connected with the double or ambiguous character of sovereignty in certain cases. Fortunately these cases have tended to decrease in number with the simplification of the political condition of modern Europe, though it may well be doubted whether recent assumptions of protectorates in Africa will not add to them in the future. They occur when two or more powers can each claim authority over certain territory. If one of them be belligerent and the other neutral, it is difficult to tell how the territory is to be regarded for war purposes. The protectorate exercised by Great Britain over the Ionian Islands gave rise to such a difficulty during the early part of the Crimean War, when the *Leucade*, an Ionian vessel, was captured by a British cruiser and brought in for adjudication before a prize court on a charge of trading with Russia, the enemy of Great Britain in the war. It was contended that, since the Ionian Islands were under a British protectorate, they were parties to the war and their vessels were forbidden to engage in commerce with the enemy. But Dr. Lushington, who tried the case, held that the Ionian republic was not a party to the war. It had a commercial flag of its own, and, though Great Britain occupied its fortresses and had control of its diplomatic arrangements, it was not involved in the public acts of the British Government unless specially included. There had been no special inclusion in the case of the then existing war. British vessels had been forbidden to trade with Russia, but Ionian vessels had not. He, therefore, restored the vessel, but would not give costs against the captors on the ground that the point was a very difficult one and that they acted in perfect good faith.[1] The cession of the Ionian Islands to Greece in 1864 has rendered a repetition of the case impossible, but we may venture to point out with regard to it that the judgment seemed to leave the determination of the status of the island republic exclusively in the hands of one of the belligerents. It is possible to imagine circumstances in which this would have operated unfairly towards the other. If, for instance, Great Britain had used

[1] Spinks, *Admiralty Reports*, vol. II, p. 212.

the islands as a depot and base of naval operations and at the same time claimed immunity for their commerce as being neutral, Russia would have had good cause to complain. In discussing cases of double or ambiguous sovereignty, Hall lays down the rule that the use to which a place is put by the power that exercises *de facto* control over it determines whether it should be regarded as neutral or belligerent territory.[1] This test is at once simple, effective, and fair as between the hostile powers; and we may hope that it will be adopted in all future cases. [The Soudan, which is under the *condominium* of Great Britain and Egypt, was held by a British Prize Court during the great war to be neutral for the purposes of domicile, but there is no reason to suppose that it was so for the purpose of belligerent operations.][2]

[1] Hall, *International Law*, 7th ed., § 174.

[2] [*The Clan Grant* (1915) 1 British and Colonial Prize Cases, 272. Oppenheim, *International Law*, vol. II, § 70.]

## CHAPTER III

### THE LAWS OF WAR WITH REGARD TO ENEMY PERSONS

### § 160

The treatment accorded to enemy subjects found in a state at the outbreak of war.

It will be convenient to begin by considering the case of enemy subjects found in a state at the outbreak of war. The treatment of such persons has varied very much at different times. In the Middle Ages a right to detain them as captives was held to exist, and though enemy merchants were generally allowed to depart, the power to arrest did not become obsolete from disuse. Accordingly the early publicists were obliged to lay down that it existed, though they strove to mitigate its severity. Grotius declared that enemies found within a territory at the outbreak of war might be captured and held as prisoners while the war lasted, but he added that they might not be detained after the termination of hostilities, as in his day ordinary prisoners were.[1] But as commerce grew more powerful arrest was less frequent, till in the middle of the eighteenth century the right to resort to it was denied by Vattel;[2] and since that day numerous treaties have been negotiated, giving a time for withdrawal varying from six months to a year. Such stipulations are hardly needed now; for the old right of arrest has been rendered obsolete by the continuous contrary custom of nearly a hundred and fifty years. The only case of detention to be found in modern times occurred in 1803, when Napoleon arrested the British subjects found in France after the rupture of the Treaty of Amiens; but this was placed on the ground of reprisal, and has almost always been regarded as a violent proceeding carried out in defiance of right. The modern doctrine is that expulsion may be resorted to in extreme cases, but unless there are special

[1] *De Jure Belli ac Pacis*, bk. III, ch. ix, 4.
[2] *Droit des Gens*, bk. III, § 63.

reasons to the contrary enemy subjects should be allowed to remain in the country as long as they give no aid or information to their own side. Great Britain inaugurated this liberal policy. In 1756, at the outbreak of war with France, she gave permission for French subjects "who shall demean themselves dutifully" to remain in the country; and her treaty of 1794 with the United States was the first to provide that in future wars between the contracting parties, subjects of each residing in the country of the other should remain unmolested as long as they lived peaceably and observed the laws, and should be granted a term of twelve months to wind up their affairs and leave, if their conduct caused them to be suspected.[1] Other states have followed this example, and treaties containing similar provisions are constantly being concluded. A modern instance of expulsion occurred in 1870 when the French Government ordered German subjects to leave the department of the Seine at the time when the German armies were moving on Paris and the population was intensely excited against all who were suspected of belonging to the enemy nationality. The authorities felt doubtful of their ability to protect such persons, and therefore adopted the extreme measure of compelling them to depart. The Boer War of 1899–1902 afforded another instance, and the Russo-Japanese War of 1904–1905 a third. In the former struggle various categories of British subjects living in the territory of the two Dutch republics were expelled, and in the latter Japanese residents in the Russian Imperial Lieutenancy of the Far East were ordered to depart, though no expulsion took place from the rest of the Russian Empire. Japan, on the other hand, allowed the Russians within her borders to remain during the war on condition that they did nothing contrary to Japanese interests.[2] [Turkey, in her war with Italy in 1911, proclaimed the expulsion of Italian residents from her dominions,

[1] Vattel, *Droit des Gens*, bk. III, § 63; *Treaties of the United States*, pp. 392, 393.

[2] *Times History of the War in South Africa*, vol. II, p. 125, vol. IV, pp. 149–151; Takahashi, *International Law Applied to the Russo-Japanese War*, pp. 20–38.

but does not appear to have put her orders in force.[1] Portugal, when she entered the great war in 1916, expelled from her territory at fifteen days notice all Germans, except males between 16 and 45 years of age (*i. e.* of military age) whom she interned].

It is clear that in the absence of treaty stipulations the right to expel remains, though the right to arrest and imprison must be regarded as obsolete. This last statement, however, applies only to alien enemies engaged in peaceful pursuits, and likely to continue so occupied throughout the war. But now that most continental nations have resorted to compulsory military service, it often happens that a young man who settles in a foreign country is already a trained soldier, and would be recalled to the colors in the event of war between the country of his birth and the country of his residence. What power has the latter of protecting herself against the reinforcement of her enemy's armed forces by thousands of effective combatants? If she expels them, or merely permits them to go should they desire to do so, they will soon be fighting against her. If she bids them remain, whether they wish to depart or not, they may rise and paralyze her defence in the event of invasion, and would in any case need constant watching. A third course is to revive the right of arrest, which has never been formally abandoned. [The practice of the states engaged in the great war varied from that of Japan, who not only left German subjects in her territory unmolested, but even allowed German reservists to go home, to that of Germany who insulted and arrested Japanese residents. Between these extremes each of the other belligerents fixed its policy. The general tendency was to give resident enemy aliens leave to depart within a short period after the outbreak of war, and, if they remained, to keep them under supervision adequate to the safety of the state. Italy and Germany had actually concluded a treaty to this effect, in 1915, before they were at war with one another. Great Britain, France, the United States and China, all expressly or impliedly allowed time for departure. Germany (with the exception above) and Austria allowed none, and made detention

[1] [*Revue Générale de Droit International*, vol. XIX, p. 408.]

the rule. As the war went on, restrictions tended to become much more severe, and in the end Great Britain and France subjected resident enemy aliens to general internment. The United States never went to this length. Germany had done so long before Great Britain. In fact, it was owing to the German outrage in sinking the unarmed British ship, *The Lusitania*, that the British order for general internment was made, for local feeling was so strong against resident aliens, that it is doubtful whether, for their own safety, any other course was advisable.[1] The general inference from the war of 1914–1919 is that probably in the future no departure of enemy aliens will be allowed, and that even if internment be not applied close restriction of movement and of freedom of action will be the rule. The basis of this view is the enormous extension of the field of warfare to both territory and persons. It was suggested in former editions of this book that a distinction might be drawn between soldiers and civilians, the former being detained, the latter allowed to depart. But where is the line to be drawn? Nowadays in a great war, what is mobilized is not merely the army, but the nation. Every member of it, male or female, except the infirm, the very old, and the very young, may possibly help in the contest by making munitions or doing work which will set free men to join the fighting line. This, be it emphasized, is no argument for treating civilians like combatants, but it is an argument for not allowing resident enemies to return home. Moreover, if according to the German theory, "every honest subject is a spy" when he is living in an enemy country, this is a reason both for preventing the departure of those who can give information of military value, and for limiting their freedom while they remain. On the other hand, surveillance on a large scale is irksome and expensive to the state and, to say the least of it, irritating to those under supervision. Possibly individual states will find a solution of the difficulty in the conclusion of treaties with one another providing reciprocally for permission to depart. Where the number of nationals resident in each state is approximately equal,

[1] [Fauchille, *Droit International Public*, vol. II, §§ 1050–1055[3]. Garner, *International Law and the World War*, vol. I, §§ 40–71.]

such a treaty would be feasible; nor would it interfere with the undoubted right of arrest of dangerous persons such as spies.]

§ 161

Ancient and modern ideas of the violence permissible in war.

The old idea of war was that it wrought an absolute interruption of all relations between the belligerents, except those arising from force, and delivered over the enemy and all that he possessed to unlimited violence. Even so humane a man as Grotius, writing at a period so late in the world's history as 1625, was obliged to declare that by the law of nations it was lawful to put to death all persons found within the enemy's territory, including women and children and such resident strangers as did not depart within a reasonable time.[1] But he is careful to add that these extreme severities are allowed only in the sense that they are not forbidden by the customs of nations. He pleads earnestly for better practices, arguing that justice requires a belligerent to spare those who have done no wrong to him, and even when justice does not demand the exercise of mercy, it is approved by goodness, moderation, and magnanimity. He excepts by name from liability to slaughter women, children, old men, priests, husbandmen, merchants, and prisoners.[2] But these *temperamenta belli* are recommended by him as counsels of perfection, rather than laid down as actual law. They were eagerly seized upon by the more humane of his successors, and gradually developed into a broad distinction between combatants and non-combatants. From the Peace of Westphalia in 1648 an improvement in the usages of warfare set in, and as they became less severe, publicists discarded the old doctrine that war authorized the citizens and subjects of each of the belligerent states to exercise unlimited violence against its foes, and substituted for it the theory that only so much stress may be put upon an enemy as is sufficient to destroy his power of resistance.[3] War is in its nature harsh

[1] *De Jure Belli ac Pacis*, bk. III, ch. iv. [2] *Ibid.*, bk. III, ch. xi.

[3] See the Preamble to the Declaration of St. Petersburg to be found in Whittuck, *International Documents*, p. 10, and Higgins, *The Hague Peace Conferences*, pp. 5, 6.

and cruel. As long as it exists at all it must involve hard blows and terrible suffering. But all possible mitigations and restraints are contained within the principle we have just enunciated and can easily be deduced from it. It limits not only the classes to whom violence may be applied, but also the measure and extent of the violence when applied. Non-combatants do not contribute to the strength of an enemy except by paying taxes and affording supplies. This can be prevented without subjecting them to personal attack or plunder, by the process of occupying the district where they live. Hence it follows that they may not be destroyed. Force is necessary to overcome the resistance of the enemy's fighting men. When that end is attained, further infliction of pain is useless. Hence it follows that the wounded must be spared and those who surrender must be received as prisoners.

## § 162

Modern military codes.

It is a curious fact that till recent times no competent thinker has endeavored to systematize and codify the rules of warfare, though discussions on various questions connected with the operations of war are almost as old as human literature. The attempt was first made by Dr. Lieber, who produced in 1863 a body of rules for the conduct of war on land, which were adopted by the government of the United States, and issued to their troops then engaged in the civil war with the Southern Confederacy as Instructions for the Government of Armies of the United States in the Field. They were largely based on the humane principles that we have just enunciated, as were also the military manuals soon after issued in imitation of the American example by some of the leading European powers. All these documents were unilateral declarations, and were binding only on the forces for whom they were drawn up. But in 1874 an attempt was made by the Emperor Alexander II of Russia to bring about the adoption of a common code for civilized states. At his instigation a conference of representatives of all the powers of Europe met at Brussels in that year to discuss the

laws of warfare on land. After long discussion the delegates were able to give their approval to a series of articles that would have formed an excellent basis for a code, though several difficult points were passed over or evaded.[1] But Great Britain declined to enter into any further negotiations for their modification and adoption; and, therefore, though most of them were already law by usage, the whole never became binding by agreement as a code. Nevertheless they were a potent influence in the production of one. The Manual of the Laws of War on Land adopted at Oxford in 1880 by the Institute of International Law was based on them;[2] and the two together formed the base, and much more than the base, of the Regulations passed by the Hague Conference of 1899, and annexed to the Convention Respecting the Laws and Customs of War on Land which was signed and ratified by nearly all the states of the civilized world. The first article of the Convention bound the signatory powers to issue instructions to their land forces in conformity with the annexed Regulations.[3] The Hague Conference of 1907 not only reënacted this obligation but improved the Regulations and made the contracting parties responsible, when belligerents, for all acts committed by persons forming part of their armed forces, and rendered them liable to pay compensation if the case demanded it.[4]

Thus the old customary law based on general usage has been largely superseded by rules deriving their force from express consent given in the form of signatures to a law-making treaty. Practically the whole civilized world has assented to it; and a state that openly, avowedly, and of set purpose, violates its provisions will dishonor its own signature and write itself down as an unscrupulous pledge-breaker. It will not find such a reputation helpful when next it wants to come to an agreement with its neighbors, even if they do not rise in indignation at the moment and compel it to mend its

[1] British Parliamentary Papers, *Miscellaneous*, No. 1 (1875), pp. 320–324.

[2] *Tableau Général de l'Institut de Droit International*, pp. 173–190.

[3] Higgins, *The Hague Peace Conferences*, p. 211; Whittuck, *International Documents*, pp. 36, 126; *Supplement to the American Journal of International Law*, vol. II, pp. 92, 93.

[4] Higgins, *ibid.*, pp. 210–213.

ways. We are not speaking here of the possible excesses of troops that have got completely out of control, or of deplorable occurrences, such as the shooting of a wounded foe, which may happen occasionally in the hurly-burly of conflict without any command from responsible authorities. These things are incidents of all wars. We must look to increased self-control and improved discipline to reduce them to a minimum; and as long as they exist, reputable states are bound to punish their authors. What we have in mind is the case of a conscious and deliberate violation of the laws of war as a matter of state policy. Now that these laws are being clearly defined and solemnly accepted by all states, the nation that could thus act must possess at once extreme unscrupulousness and enormous strength. It is just possible that now and again such a combination would occur. A ruler drunk with the consciousness of overwhelming power might venture to defy the moral sentiments of mankind, but only to discover by and by that outraged humanity avenges itself in unexpected ways. He could not ride off on the plea of military necessity; for, as Professor Westlake has been careful to point out,[1] we have evidence in the preamble of the Hague Conventions on the subject that "military necessity has been taken into account in framing the Regulations, and has not been left outside to control and limit their application." The powers distinctly say that the wording of the rules which they have drawn up "has been inspired by the desire to diminish the evils of war so far as military necessities permit." [2] Those, therefore, who imagine that a state is free to ignore because of the exigencies of the moment any rule to which it has subscribed its signature are as erroneous in their reasoning as they are anarchical in their sentiments. The laws of war are made to be obeyed, not to be set aside at pleasure.

But the military code is not yet complete. The plenipotentiaries assembled at both the Hague Conferences were

[1] *International Law*, part II, p. 61.

[2] Higgins, *The Hague Peace Conferences*, p. 209; Whittuck, *International Documents*, pp. 35, 36, 125; *Supplement to the American Journal of International Law*, vol. II, p. 91.

abundantly aware of the fact that their Regulations for the conduct of war on land did not cover the whole ground. They put on record in the preamble of the Convention of 1899 on the subject, and again in the similar Convention of 1907, that it had not "been found possible at present to concert stipulations covering all the circumstances which arise in practice." They then proceeded to negative the supposition that the omitted questions should "be left to the arbitrary judgment of military commanders," and went on to declare that "in cases not included in the regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established between civilized nations, from the law of humanity, and the requirements of the public conscience."[1] Thus it is still necessary to appeal to the best customs of the best peoples, and even to supplement and modify them by moral considerations, in order to fill up the gaps in the laws of war on land as formulated by the quasi-legislative organ of the society of nations. We shall therefore resort to this method in the outline that follows.

§ 163

We will begin by dealing with combatants. It has been shown already[2] that the distinction between them and non-combatants in respect of the severities of warfare is comparatively modern, and represents a conspicuous triumph of humanity. It is, however, obscured by the wording of Article 3 of the Hague Regulations, which declares that "the armed forces of the belligerents may consist of combatants and non-combatants." Here the non-combatants are a division of the armed forces, and consist apparently of those who perform auxiliary services, such as driving a baggage wagon or working a field telegraph. Such persons often carry arms and are expected to use them if attacked, though they are not placed in the fight-

Treatment of combatants. The grant of quarter.

[1] Higgins, *The Hague Peace Conferences*, pp. 201–211; Whittuck, *International Documents*, pp. 36, 125, 126; *Supplement to the American Journal of International Law*, vol. II, pp. 91, 92.

[2] See § 161.

ing line and as a rule take no active part in the conflict. They should, however, be reckoned as combatants, since they are attached to the combatant forces and do fight on rare occasions. The true non-combatants are those who are enrolled in no force, carry no arms, and are engaged in the ordinary occupations of peaceful life. We will use the distinction in what we conceive to be the correct sense; and the first proposition we will lay down is that

*Combatants are entitled to quarter.*

When an armed enemy ceases to fight and asks for mercy, he is said to solicit quarter; and when his life is spared and he is made prisoner, quarter is said to have been granted to him. The slaughter of the vanquished was a common incident of warfare till about the end of the sixteenth century, when it began to be deemed obligatory to give quarter to those who surrendered and begged for life. But for some time longer the rule in favor of it was frequently disregarded, or suspended altogether with regard to certain classes of combatants, as, for instance, Croats and Pomeranians in the Thirty Years' War, and Irish royalists in the English civil war between King and Parliament. The more humane practice, however, steadily won its way till it became a part of the code of military honor. According to modern ideas quarter can be refused only when those who ask for it attempt to destroy those who have shown them mercy. But it must be remembered that in a charge, and especially a cavalry charge, it is almost impossible to distinguish between those who wish to surrender and those who are determined to die fighting. The twenty-third Article of the Hague Regulations declares that it is particularly forbidden "to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion" and also "to declare that no quarter will be given."[1] In view of the history of war we should note carefully that these rules contain no saving clauses. The conquerors of antiquity

[1] Higgins, *The Hague Peace Conferences*, p. 235; Whittuck, *International Documents*, p. 135; *Supplement to the American Journal of International Law*, vol. II, p. 106.

generally put to death all the defenders of besieged places. In the Middle Ages it was deemed an offence for a garrison to prolong a resistance that the besiegers regarded as fruitless, and if the place was finally given up, some of them were executed. Even in comparatively recent times, when a fortress was taken by assault, the fighting men could claim no mercy. This was the opinion of the great Duke of Wellington, who wrote, "I believe it has always been understood that the defenders of a fortress stormed have no right to quarter."[1] His own practice was more merciful. When he carried a place by storm, he accepted the surrender of those of the garrison who survived the struggle. The growth of this humane practice has been fostered by a change in the conditions of warfare. Towns are now defended by forts and earthworks erected at a considerable distance from them. When some of these are taken, the place becomes untenable, and is surrendered, as was Port Arthur in 1905 as soon as the Japanese captured 203-metre hill. Recent conflicts between civilized powers have afforded no instance of the slaughter of a garrison. And when the time came to formulate the laws of war by international agreement, no attempt was made to restore the old severity, but the obligation to give quarter was imposed in the widest terms.

§ 164

We will now consider the case of those who have given themselves up and received quarter. The rules at present in force with regard to them may be summed up in the words,

*Prisoners of war are cared for and treated with humanity.*[2]

But it was the custom of early times to kill them, and some tribes tortured and ate them. Slavery was a mitigation of their lot. The reduction to it was justified by the legal-minded Romans on the ground that it was a merciful relaxation of the strict rules of warfare which gave the victor a right to the life of his captives.[3] Enslavement was practised long after slaugh-

[1] *Despatches*, 2d Series, vol. I, pp. 93, 94.

[2] [See Roxburgh, *Prisoners of War Information Bureau in London* (1915).]

[3] Justinian, *Institutes*, bk. I, tit. iii, 3.

ter was abandoned. A species of state servitude survived the sale of prisoners of war as human cattle to any chance buyer. As late as the seventeenth century the Spaniards sent their prisoners to the galleys. Grotius declared that Christians ought to be content with ransom and refrain from reducing one another to slavery.[1] In mediaeval warfare prisoners of rank and fortune were generally allowed to ransom themselves; but the common soldiers, who would not raise the necessary funds, were vilely treated and occasionally slain. Then it came to be regarded as the business of the state to redeem its subjects from captivity, and we find in the seventeenth century international agreements for ransom according to an established scale. The last of these was concluded between England and France in 1780. It valued a marshal of France or an English admiral at sixty men, officers of lower grades were assessed in proportion, and the equivalent of a man in English money was a pound sterling. Thus a marshal or an admiral could be exchanged for sixty men or ransomed for sixty pounds.[2] In modern times exchange became the rule, but in recent wars it has been seldom resorted to, and the prisoners on both sides have been held to the end of the struggle. Officers have been frequently released on parole, that is to say, after pledging their word of honor not to serve again during the existing war against their captor or his allies, and occasionally the benefit of this practice has been extended to the rank and file. According to modern rules the right to detain prisoners ceases when the war ceases. Each side must then make arrangements for their repatriation. But up to the Peace of Westphalia in 1648 it was necessary to make special stipulations for such release without ransom; and in default of any arrangement of the kind the prisoners were detained in captivity.

The lot of prisoners is now determined by the Hague Regulations of 1907. What follows is an outline of these rules with a few explanations and additions. The public armed forces of the enemy are not the only persons who may be made pris-

[1] *De Jure Belli ac Pacis*, bk. III, ch. vii, 9.
[2] Manning, *Law of Nations*, bk. IV, ch. viii.

oners of war. Those who follow an army without belonging to it, such as newspaper correspondents, sutlers, and contractors, may be detained, if the enemy thinks fit to do so. In that case they have a right to the treatment accorded to prisoners of war, if they can produce a certificate from the miliarty authorities of the army that they were accompanying. We are not told what is to happen to them when they have no certificates and their detention is deemed advisable. They should certainly be treated with humanity. In practice the alternative lies between a more or less rough dismissal and what is now the privileged position of prisoners of war. Members of the enemy's royal family, his chief ministers of state, and his diplomatic agents, would doubtless be captured if found in the theatre of hostilities. It was the practice to detain as prisoners the crews of enemy merchantmen seized as prizes; but the eleventh Convention of the Hague Conference of 1907 released them from this liability, on condition of a promise in writing not to undertake any hostile operations during the continuance of the war. This refers to enemy subjects. Neutral subjects are to be set at liberty without conditions, if they are common sailors. If they are officers of the captured vessel, they must promise in writing not to serve on an enemy ship while the war lasts.[1] The position of chaplains and surgeons was at one time doubtful; but the Geneva Convention of 1864 protected them from capture, together with the whole staff engaged in the care of the sick and wounded, while employed in their humane tasks, and the revised Geneva Convention of 1906 declared in so many words that "if they fall into the hands of the enemy, they shall not be treated as prisoners of war." The tenth of the Hague Conventions of 1907 applies the same rule to the religious, medical, and hospital staff of any captured ship.[2]

As soon as prisoners are captured they come under the

[1] Higgins, *The Hague Peace Conferences*, pp. 397, 398; Whittuck, *International Documents*, pp. 185, 186; *Supplement to the American Journal of International Law*, vol. II, pp. 170, 171.

[2] Higgins, *ibid.*, pp. 9, 23, 369; Whittuck, *ibid.*, pp. 3, 75, 177; *Supplement to the Amer. Jour. of Inter. Law*, vol. I, pp. 90, 203, and vol. II, p. 159.

power of the hostile government. It, and not the individual captors, is responsible for their treatment. Their personal belongings remain their property, with the exception of their arms, horses, and military papers, which may be confiscated. The government into whose hands they have fallen is bound to feed and clothe them, putting them in these respects on a level with its own troops. They may be set at liberty on parole, if the laws of their country allow them to pledge their word in exchange for freedom; but in such a case their own government must neither require nor accept from them any service incompatible with the parole given. Should they break their word of honor, and be recaptured while serving again, they have no claim to the treatment of prisoners of war, but may be put on trial before a military court. Such courts may inflict the death penalty, though the Hague Code does not go so far as to suggest that they should. Speaking generally, prisoners can only be interned; that is, restricted under proper supervision to a fortress, or camp, or indeed any reasonably healthy locality; but they may be placed in confinement as a measure of safety, and for no longer time than the necessity continues. This last stipulation in their favor is one of the contributions of Latin America to the Hague Code. It was proposed at the second Conference by the Cuban delegate, and carried unanimously.[1] Disciplinary measures may, of course, be taken to put down insubordination, and prevent escape. Prisoners caught in an attempt to get away may in the last resort be cut down or shot, and, if recaptured, they may be punished. But if they succeed and are able to rejoin their own army or leave the territory occupied by the army that captured them, no severity of any kind may be inflicted on them because of their escape, should they be recaptured. Prisoners who escape to neutral territory, and prisoners who are brought by troops taking refuge there, are to be left at liberty; but if the neutral power allows them to remain, it may assign them a place of residence.[2]

[1] Higgins, *The Hague Peace Conferences*, pp. 261, 262.

[2] Holland, *The Laws of War on Land*, p. 65; *Fifth Hague Convention of* 1907, Article 13.

While prisoners remain in the power of their captors, the state may employ the private soldiers, but not the officers, in useful work, provided that it is not excessive and has "no connection with the operations of the war." It may become a question whether these words prohibit the employment of prisoners on fortifications and other military works in the interior of the enemy country and at a distance from the scene of warfare.[1] One side might argue that such works would not be made but for the war, and must therefore be connected with it. The other might reply that the actual hostilities took place at a distance, and therefore there could be no connection between the works and the operations of the war. On the principle that a lax rule well observed is better than a strict rule constantly evaded, the second interpretation should be preferred. Prisoners may be told off to work for other branches of the public service as well as for the military authorities, and also for private persons. In all cases they are to receive pay, which is to be expended on the improvement of their position, the balance being handed to them on their release with deductions for the maintenance. It often happens that the treaty of peace contains stipulations for the repayment by each side to the other, or at any rate by the vanquished to the victor, of the sum spent on the support of prisoners of war. When this has been done, no deductions would be needed, nor would they be required in the case of states such as Great Britain, which does not charge the maintenance of its prisoners against their earnings.[2] When the state is the employer, it must pay the wages that it gives to its own soldiers for similar work. When the prisoners labor for subordinate public bodies or private individuals, the terms must be settled by agreement between the military authorities and the employers. Though officers cannot be set to task-work by their captors, they are not left without pecuniary resources. They must receive the same pay as officers of corresponding rank in the country where they are detained, and the amount so expended must be refunded by their own government at the end of the war. Prisoners of war are to have

[1] Holland, *The Laws of War on Land*, pp. 21, 22. [2] *Ibid.*, p. 22.

full liberty of worship. Presents and relief in kind for them are to be admitted untaxed and to be carried by state railways free of charge. Their correspondence is to be exempt from postal charges, not only in the belligerent countries, but in all neutral states through which it may pass; and whatever privileges in the matter of wills are given to soldiers of the national army must be given to them also. At the Hague Conference of 1899 it was agreed that representatives of legally constituted societies for giving aid and comfort to prisoners of war were to receive every facility consistent with military exigencies for distributing relief in the various prison-camps and places of internment. Moreover, each belligerent was to establish an information bureau in its territory, charged with the duty of keeping a full record of each prisoner from the moment of his capture to the moment of his death or release. In 1907 it was added that these returns should be sent to the government of the other belligerent after the conclusion of peace. The bureaux were also to reply to enquiries about the prisoners, and to gather together and forward to those concerned all personal effects, letters, and valuables found on the field of battle or left by prisoners who had died, escaped, or departed by reason of exchange or release on parole.[1] Professor Takahashi gives in part II, chapter II, of his *International Law Applied to the Russo-Japanese War*, an interesting and often most pathetic record of the thorough way in which this work was done by a careful and humane belligerent in a great struggle.

The rules we have just set forth, if properly carried out in practice, secure for prisoners of war a treatment far better than was customary in previous ages, though they do not remove all possibility of hardship. Captured foes may have to undergo long marches with little food and indifferent shelter. A commander, whose own men are on short rations, cannot be

[1] For the treatment of prisoners as described in the text, see Higgins, *The Hague Peace Conferences*, pp. 220–233; Whittuck, *International Documents*, pp. 130–134; Scott, *The Hague Peace Conferences*, vol. II, pp. 379–387; *Supplement to the American Journal of International Law*, vol. II, pp. 98–105; or any other publication that gives the text of the Hague Regulations.

expected to feed his prisoners liberally; nor can a ragged band of victors find warm clothing for the adversaries they have taken. If they are permanently unable to maintain them, they should release them, as the Boers did again and again during the latter part of their struggle against Great Britain in 1899–1902. War is in its nature cruel, and all humanity can do is to deprive it of unnecessary horrors. The Hague Regulations as to captives marked a great advance towards this end, and scarcely had they been drafted in 1899, when Great Britain went beyond them in the Boer War, and organized sports and schools for the benefit of her prisoners interned in Ceylon and St. Helena. Three or four years later Japan followed the British example, and is said to have imported special cooks to prepare European food for her Russian prisoners. It may be hoped that similar advances will take place in other departments of warfare.

[During the great war, the Hague Regulations as to prisoners of war were on the whole observed, and in several states faithfully carried out. The notable exception was Germany. She violated the convention in nearly every detail. There were officers who were not paid according to scale; there were men whose clothing was robbed, whose food was insufficient and uneatable, whose correspondence was forbidden or unreasonably delayed, whose employment in some cases resembled that of convicts, except that it was less hygienic, and in other cases was entirely unlawful, as where it was in munition factories, or so close to the fighting line as to bring the prisoners under the guns of their comrades. The disciplinary treatment in some internment camps was a mere guise for torture. In the internment camp for civilians at Ruheleben the conditions were vile; in the military camps at Wittenberg and Gardelegen, they were unspeakable. The evil plight of these latter places led to an outbreak of typhus and to an unpardonable display of neglect, cruelty and cowardice on the part of those in charge. It is true that, if the figures are to be trusted, Germany had, less than half way through the war, more than a million and a half of prisoners of war, that a large number of these was captured at an early period, and that, by the time of the armis-

tice, her own population was in great straits. These facts may be some excuse for the bad accommodation of prisoners in the early stages of the war and for their semi-starvation at the end of it. They are none whatever for the brutality that was conspicuous throughout it in some of the internment camps and elsewhere.][1]

§ 165

When ancient and modern warfare are compared, it is not in the treatment of prisoners only that the latter shows to great advantage. In these days

*Provision is made for tending the sick and wounded,*

whereas we hear little of wounded in the battles of antiquity, when the usual lot of enemies left helpless on the field was to be first plundered and then killed. No special organization appears to have been provided for their relief till 1190, when, at the great siege of Acre during the Third Crusade, the order of Teutonic Knights was founded to tend them. Then for ages the task of caring for the sick and wounded was left to private and generally ecclesiastical benevolence. But in the seventeenth century states began to send into the field along with their armies a small number of surgeons and chaplains, and a few field-hospitals; and since then much progress has been made in this department of army organization. In modern wars state provision has been supplemented by private effort; and in some cases neutral societies and individuals have given aid from motives of humanity. At last in 1864 humanitarian arrangements of an international character were made. In that year the Swiss Government, moved thereto by the terrible account of M. Dunant, who had seen the sufferings of the sick and wounded in the campaign of Solferino, called together a Conference of twelve states at Geneva. The result was a Convention which gradually obtained the adhesion of practically all the powers of the civilized world. It protected the sick and wounded from violence, and provided that all

The care of the sick, wounded, and shipwrecked.

[1] [Garner, *International Law and the World War*, vol. II, §§ 331–360. Fauchille, *Droit International Public*, vol. II, §§ 1127 [2]–1127 .[9]]

persons and things connected with the care of them should enjoy exemption, as far as possible, from the severities of warfare. It represented an enormous advance, though its provisions were by no means complete. An attempt to remedy some of its deficiencies and to extend it to naval war was made in 1868; but the articles drawn up in that year were never ratified. The Hague Conference of 1899 produced a Convention for the Adaptation of the Principles of the Geneva Convention to Maritime Warfare. It also proclaimed in its Regulations for the conduct of war on land that "the obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention of the 22d of August, 1864, subject to any modifications which may be introduced into it." [1] The expected modifications were made in 1906, when the representatives of thirty-seven powers met at Geneva, and produced a new, more effective, and more elaborate Geneva Convention. The Hague Conference of the following year repeated the declaration of its predecessor as to the obligations of belligerents towards the sick and wounded in land warfare, with the difference that it spoke of "the Geneva Convention" instead of dating and defining it, and alluding to possible modifications.[2] The Geneva Convention referred to is that of 1906, and therefore all powers accept it who accept the military code drawn up by the Second Peace Conference. The Conference revised and improved the Convention of 1899, which extended the principles of the Geneva Convention to war at sea. Its labors covered the whole field of hostilities; and in the remarks that follow we shall endeavor to give a brief summary of their results.

We will begin with war on land. Sick and wounded combatants are to be cared for by the belligerent in whose power they are, without distinction of side or nationality. If they fall into the enemy's hands, they are his prisoners; but various mitigations of their lot as such are suggested, rather than made obligatory, among them being a repatriation of the injured when they are fit for removal, or their internment in a neutral state with the latter's consent. A belligerent

[1] See Article 21 of 1899.

[2] See Article 21 of 1907.

who is compelled to abandon his invalids to the enemy should leave with them such of his medical *personnel* and material as he is able to spare. Military authorities may ask the civilian inhabitants of the scene of warfare to assist under direction and supervision in the care of the wounded and sick of the armies, and may grant special immunities to those who respond to the appeal. Victorious commanders must protect those left on the field from pillage or other maltreatment. They are bound, further, to arrange for the careful examination of the enemy's dead, and to send their military identification marks to the authorities of their country or army. Each belligerent is to collect all articles of personal use, valuables, and letters found on the bodies of dead foes, whether they perished on the battlefield or in his hospitals. He is then to forward these things to the authorities of the enemy's country, for transmission to those interested. In addition he must send lists of the sick and wounded who have been collected by him. All belligerents are not only to refrain from attacking, but are also to protect, all authorized organizations for rendering aid, whether, like field-hospitals, they accompany the armies, or are stationary, like base hospitals; but if they are made use of to commit acts harmful to the enemy, their immunity comes to an end. The medical, nursing, and administrative staff of the organizations for the relief of the sick and wounded have similar privileges, and hold them under similar conditions. Neither they, nor the guards told off to protect hospitals and ambulances, may be made prisoners of war. Chaplains have the same exemption. Voluntary aid societies of a belligerent state must be recognized and authorized by their own government before they can share the immunities just described; and neutral aid societies require two authorizations, one from their own state and one from the belligerent to whose forces they propose to attach themselves. The latter state must also notify its enemies that it means to make use of their assistance. Should the personnel of any of these organizations, public or private, fall into the hands of the other side, they must continue to carry on their duties; but when their assistance is no longer necessary, they are to be sent back along with

their private property to their army or their country. While they are serving under the enemy's control, he must give them the same pay and allowances as are granted to persons holding similar rank in his own army. The enemy may use for the treatment of the sick and wounded the material of the field-hospitals and mobile organizations that fall into his hands, but must restore what remains under the conditions laid down for the restoration of the medical personnel. The buildings and material of fixed establishments may not be devoted to other purposes while they are needed for the care of the patients. But urgent military necessity may override this rule, provided that the military commander who has captured and has control of the establishments makes other arrangements for the care of the sick and wounded under treatment therein. The material of voluntary aid societies found in such buildings is exempt from confiscation as being private property, but is subject, like other private property in occupied districts, to the right of requisition.[1] Convoys of sick and wounded in course of conveyance are put on the same footing as the field-hospitals and similar organizations, which are called in the Convention "mobile medical units." But they may be broken up under stress of military necessity, provided that the commander who takes this step provides for the care of the patients.

The distinctive sign of the humanitarian service we are engaged in considering is a red cross on a white ground. Turkey, however, uses a red crescent, and Persia, the lion and red sun; but both powers recognize the duty of respecting the red cross. The emblem is to be worn as a badge on the left arm of the personnel, affixed to the vehicles and other material in use, and flown as a flag over the medical units and other establishments that are entitled under the Convention to respect and protection. The Red Cross flag must be accompanied by the flag of the belligerent to whose forces the units or establishments belong, except when they have fallen into the enemy's hands, when the Red Cross alone is shown. No neutral flag is allowed, even though the ambulance or hospital belongs to a

[1] See § 180.

neutral aid society. The duty of carrying out the provisions of the Convention, and applying its principles to cases not specifically provided for in it, is laid on the commanders-in-chief of the belligerent armies. The signatory powers are bound to arrange for the instruction of their troops, and especially the protected *personnel*, in the provisions of the Convention, and undertake further to bring them to the notice of the civil population.[1]

A neutral state is free to authorize the passage over its territory of sick and wounded belonging to the belligerent armies; but neither *personnel* nor material of war must be carried with them. It must guard any of the sufferers who may be committed to its care, so as to prevent them from taking part again in the operations of the war; and the same duty devolves on it with regard to those, if any, who belong to the side opposed to the army that sends the convoy. These rules with regard to neutral powers are taken, not from the Geneva Convention, but from the fifth of the Conventions of the Hague Conference of 1907, which adds that the Geneva Convention applies to sick and wounded interned in neutral territory.[2] [In 1914, the Dutch Government, on the request of Great Britain gave permission to British hospital ships to take on board at Antwerp sick and wounded with a view to convey them to England by the Scheldt. But Antwerp was captured by the Germans before advantage could be taken of this permission. In 1915, on the other hand, the United States refused to allow the passage across its territory of Canadian soldiers returning home wounded or on leave.[3] These cases clearly show that the grant of such permission is quite optional to the neutral state.]

We now come to the provisions made for the care of the sick and wounded in warfare at sea. They are governed by

[1] For the text of the Geneva Convention of 1906, with illuminating comments, see Holland, *Laws of War on Land*, pp. 27–40, 116–120, and Higgins, *The Hague Peace Conferences*, pp. 18–38.

[2] Holland, *Laws of War on Land*, pp. 65, 66; Higgins, *The Hague Peace Conferences*, pp. 285, 292, 293; Whittuck, *International Documents*, pp. 146, 147; Scott, *The Hague Peace Conferences*, vol. II, pp. 406–499; *Supplement to the American Journal of International Law*, vol. II, pp. 120–122.

[3] [Fauchille, Droit International Public, vol. II § 1460.]

Convention No. X on the subject made by the Second Hague Conference in 1907, which was a repetition, with many improvements and extensions, of the similar Convention negotiated at the Conference of 1899. It recognized three kinds of hospital ships, all of which are to be respected, and held free from capture and from the restrictions imposed on warships in neutral ports, on the fulfilment of certain conditions the nature of which will appear as we proceed. The first kind consists of ships constructed or adapted by states, solely with the view of aiding the wounded, sick, and shipwrecked. These, with their boats, which share their immunities, are to be painted white, with a horizontal band of green, and to fly the Red Cross Geneva flag along with their national flag. The second kind consists of ships equipped wholly, or in part, at the expense of private individuals, or officially recognized relief societies of belligerent nationality. They and their boats are to be painted white, with a horizontal band of red, and to fly the Geneva flag along with their national flag. The third kind consists of ships equipped wholly or in part at the cost of private individuals or officially recognized relief societies of neutral nationality. They and their boats are to be painted in the same way as the second class; but they are to fly, in addition to the Geneva flag and their national flag, the flag of the belligerent under whose control they are placed. All hospital ships must be attached to one or other of the opposing fleets; and before they are employed their names must be sent by the power they serve to its adversary. The hospital ships fitted out by private individuals or societies of belligerent nationality must have a commission in the shape of a document from their government setting forth that the vessels have been under official control while fitting out and on final departure. The hospital ships fitted out by private individuals or societies of neutral nationality must be placed under the control of one of the belligerents with the previous consent of their own government and the authorization of the belligerent government. But though private hospital ships are thus, like public hospital ships, subject to the direction of the naval commanders, and unable to wander from fleet to fleet at the will of

their owners, they are to assist the wounded, sick, and shipwrecked, without distinction of nationality, and the same obligation is laid on their public compeers.

No hospital ship must hamper the movements of the combatants. During and after an engagement all of them act at their own risk and peril. The belligerents have the right of control over them, even to the extent of searching them, ordering them off, making them take a certain course, and putting a commissioner on board. They may detain for a time the hospital ship of an enemy, if the necessities of warfare require such an extreme step to be taken, and when it is taken, the ship must haul down the national flag of the belligerent to whose fleet it is attached. The question how best to secure at night for hospital ships the immunities to which they are entitled is very difficult. It is obvious that the display of a light by any of them might betray to the enemy the whereabouts of a squadron advancing to the attack, or in hiding, or endeavoring to slip away in the darkness. The same remark applies to any kind of luminous paint. The Conference decided that no measure that might be suggested for making plain in the night the special painting of hospital ships should be adopted without the assent of the belligerent whom they were accompanying. It is to be presumed that no commander would allow them to jeopardize the success of an important nocturnal enterprise. The sick-bays of warships cannot be protected from the effects of shot or shell fired from a distance at the ship of which they form a part; but it is provided that, if a fight takes place on board, they are to be respected and spared as far as possible. Their comparatively small immunities vanish, together with the large immunities of hospital ships, if either are used to commit acts harmful to the enemy. It is, however, expressly stated that the presence of wireless telegraphy apparatus on board, and the arming of the Red Cross staff for the maintenance of order and the defence of their patients, are not to be reckoned among the acts in question. If the humane work provided for by the Convention is to go on, it is highly desirable that naval commanders should construe strictly the rule of no participation,

direct or indirect, in hostilities. The temptation to use a hospital ship as a scout or a despatch boat must be very strong, but it should be firmly resisted. The Russian hospital ship *Orel*, called in the Japanese official documents the *Aryol*, was captured during the battle of Tsushima and confiscated as prize of war because she had carried on order from Admiral Roshestvenski to one of his vessels during the outward voyage of the Baltic Fleet, and had been used less than a week before the battle as a place of reception for the master and some of the crew of the British steamer *Oldhamia*, which had been captured by the Russian crusier *Oleg*.[1] [A similar case occured during the great war, when a British Prize Court condemned *The Ophelia*, which was alleged by the German government to be one of its hospital ships, but which was adopted and used as a signalling ship for military purposes, and not for the sole purpose of aiding the wounded, sick, and shipwrecked.] [2]

If neutral merchantmen, yachts, or small craft rescue sick, wounded, or shipwrecked men, whether of their own initiative or because they have been asked to do so by a belligerent officer, they cannot be captured for having such persons on board, though they remain liable to seizure for any ordinary offences, such as carrying contraband or breaking blockade, which they may have committed.

Turning from hospital ships to the patients, staff, and material they carry, we find that all combatants [3] and other persons officially attached to fleets or armies are to be taken on board and tended when sick or wounded without regard to their nationality. If a warship is captured, or a hospital ship is seized for acts harmful to the enemy, the religious, medical, and hospital personnel are not to be made prisoners of war; but they must continue to discharge their duties while necessary, and when they leave with the permission of the commander-in-chief, they may take away with them their surgical instruments and such other objects as are their own private

[1] Takahashi, *International Law Applied to the Russo-Japanese War*, pp. 620–625.

[2] [L. R. (1915) P. 129. Higgins, *War and the Private Citizen*, pp. 73–87.]

[3] [See *British Year Book of International Law* (1921–1922), pp. 177–178.]

property. While they remain, they are to receive the same pay and allowances as are granted to persons of similar rank in the navy that detains them. Their patients are prisoners. The captor may keep them, or send them to a port of his own country, to a neutral port, or even to an enemy port. They cannot be landed at a neutral port without the consent of the government of the neutral country, which will generally make special arrangements with the belligerent government as to their treatment. But in default of any agreement, the neutral state is bound to prevent the prisoners from taking part in the war again, and the state to which they belong is bound to bear the expenses of their internment. Prisoners landed by their captor in a port of their own country must not serve again while the war lasts. The rules as to searching for the sick and wounded after an engagement, the due performance of the rite of burial, the exchange by the belligerents of military identification marks found on the dead and lists of the sick and wounded picked up on the field, the sending by each belligerent to the other of the objects of personal use, valuables, and letters that have come into his possession, and the forwarding of information as to the internments, admissions to hospital, and deaths among the enemy's sick and wounded in his hands, are the same as those of the Geneva Convention, except that the shipwrecked are added to the sick and wounded in the recitals of those to whom succor is to be given. Commanders-in-chief at sea have the same humanitarian duties laid on them as those on land, and the signatory powers the same obligation to instruct their naval forces in the provisions of the Convention and bring them to the notice of their people. Turkey and Persia have made the same reservations as to the use of the red crescent, and the lion and red sun respectively, instead of the red cross. And lastly a solution has been found of a difficulty that baffled the Hague Conference of 1899. It is impossible to go into the details of it here.[1] All that can be

[1] They can be found in Higgins, *The Hague Peace Conferences*, pp. 387–390; Lawrence, *War and Neutrality in the Far East*, 2d ed., pp. 71–75; Report of M. Renault given in *Deuxième Conférence Internationale de la Paix*, vol. I, p. 75; and Westlake, *International Law*, part II, pp. 187–189.

done is to state briefly the conclusion reached after much discussion at the two Hague Conferences. It will be remembered that the Convention we are considering proclaims the immunity from capture of neutral private vessels that take on board sick, wounded, or shipwrecked combatants. So far there was universal agreement. But the question of subsequent treatment immediately arose. On the one hand it was argued that by coming under the neutral flag these people were withdrawn from the operations of warfare, and, therefore, ought not to be given up to their enemies as prisoners or restored to their friends to fight again on recovery, but interned on neutral territory till the end of the war. On the other hand, it was declared that the right of search possessed by belligerents carried with it a right to make prisoners of all the sick, wounded, or shipwrecked members of the enemy's fighting services that might be found on board the neutral vessels searched; and the alleged impossibility of restraining officers from seizing an important commander on the other side if they found him on board a neutral vessel was put forward as a reason for allowing what could not in any case be prevented. In the end the latter view prevailed at the Hague Conference of 1907, in spite of the opposition of the British representatives. The Convention on the subject not only declared that a belligerent warship might demand the surrender of any sick, wounded, or shipwrecked combatants found on board military hospital-ships, or hospital ships belonging to relief societies of private individuals, but also added that it had the same right with regard to private neutral merchantmen, yachts, or other boats that had responded to the call of humanity and cared for the injured or drowning. Since neutral warships cannot be searched, this rule does not apply to them. It was, however, agreed that if such persons as we are discussing were received on board they must not be allowed to take any further part in the war.[1] Great Britain accepted the article con-

[1] For the text of the Hague Convention for the Adaptation of the Principles of the General Convention to Maritime War, with comments, see Higgins, *The Hague Peace Conferences*, pp. 358–391. For the text alone, see Whittuck, *International Documents*, pp. 173–182; Scott, *The Hague Peace Conferences*, vol. II, pp. 446–462; *Supplement to the American Journal of International Law*, vol. II, pp. 153–167.

taining these rules with the proviso that she understood it to refer "only to the case of combatants rescued during or after a naval engagement in which they have taken part." [1]

[The Geneva Convention, 1906, contains a clause of common occurrence in the various Hague Conventions, which tends to make many of them nugatory. Article 24 provides that it ceases to be binding from the moment when one of the belligerent powers is not a party to the Convention. Article 30 puts it in force for each signatory power six months after it ratifies. In the great war, a few of the belligerents had not ratified the Convention, but all of them were bound by the earlier Geneva Convention of 1864, which Article 31 of the Convention of 1906 left in force as between the states who did not ratify the later one. Similarly, with respect to the Hague Convention, No. X of 1907, which dealt with sick and wounded at sea, many of the belligerents were not bound by it for lack of ratification, but all were bound by the corresponding Convention of 1899. Throughout the war, belligerents repeatedly accused one another of disobeying all these Conventions. Some of the charges may have been false wholly or partially, others may have been the consequence of mistakes; but there is such a mass of evidence against one state—Germany—that there can be no doubt of her intentional or reckless law-breaking on many occasions. Her military authorities fired on Red Cross workers, robbed them of their equipment, ill-treated the wounded, and abused the Red Cross symbol by using it on automobiles mounted with machine guns and by transporting munitions in ambulances. But the two most disgraceful violations of her international obligations were the bombing of hospitals by her aviators, and the sinking of hospital ships by her submarines. Both were part of a deliberate policy. The excuse alleged for torpedoing the ships was at one time mistake of fact, for which there was generally no foundation whatever; at another, that British hospital ships were used for military purposes, for which there was not a scrap of evidence, as the slightest attempt to exercise the right of search would have proved. The sinking by the Turks of the Russian hospital

[1] British Parliamentary Papers, *Miscellaneous*, No. 6 (1908), p. 148.

ship, *Portugal*, was just as shameful and deliberate as that of the *Britannic*, the *Asturias*, and many other British hospital ships by the Germans. In one case only was an allegation made by Germany or her allies that one of their hospital ships had been sunk. This was the Austrian *Elektra*, but whether the ship was properly marked or what the circumstances of her loss were does not clearly appear.][1]

§ 166

The last point to be noted with regard to combatants is that

*Certain means of destruction are forbidden.*

It is now held that the object of warlike operations is not to wreak vengeance on the enemy or gratify personal animosity against him, but to destroy his power of resistance and induce him to make terms as soon as possible. Consequently any applications of force that inflict more pain and suffering than is necessary in order to attain this end are forbidden by modern International Law. A feeling against treachery is the base of further prohibitions. All the forbidden methods of destruction will be discussed in the chapter on The Agents and Instruments of Warfare.

The prohibition of certain means of destruction.

§ 167

We have now to sketch the usages of war with regard to the persons of non-combatants. We have already seen that till the distinction between combatants and non-combatants was clearly and definitely embodied in the laws of war in the latter half of the seventeenth century, the unarmed inhabitants of an invaded country were exposed to shameful indignities, and sometimes even to slaughter, though in Christian Europe it was not considered right to reduce them to slavery. But it must be remembered that the change to more humane methods did not take place in a moment without previous hint or warning. It was a matter of gradual growth. We find in ancient and mediaeval

The gradual amelioration of the condition of non-combatants.

[1] [Garner, *International Law and the World War*, vol. I, §§ 313–330. Fauchille, *Droit International Public*, vol. II, §§ 1118 [6], 1395 [41–42].]

warfare instances of humanity towards non-combatants which increase in number as time goes on, though occasionally there is a period of distinct retrogression, such as the terrible Thirty Years War, which was, however, followed by seventy years of rapid progress. When Henry V of England invaded France in 1415, he forbade violence to the peaceful population and insults to women, and severely punished the perpetrators of such outrages, whereas less than a century before, the track of the armies of Edward III was marked by a broad line of fire and slaughter. The famous Chevalier Bayard was remarkable for his humanity to the inhabitants of invaded districts; and when the Earl of Essex took Cadiz in 1596 he permitted the inhabitants to ransom themselves in a body and to depart in English ships to a place of safety before the pillage began. They had, however, to be content to escape with nothing but the clothes they wore, saving and excepting some ancient gentlewomen who were allowed to put on two or three best gowns apiece. After the departure of the inhabitants, the place was sacked and destroyed, with the exception of the churches and religious houses. Such proceedings would now be denounced as barbarous, but then the English were praised for their "heroical liberality." And certainly their conduct was an improvement upon the methods of coast warfare in vogue at the time and previously, when to descend upon the shores of an enemy, surprise and sack his seaports, hang the peaceful inhabitants over their own doorsteps, and set fire to the place on departing from it, were regarded as ordinary incidents of hostilities.[1] The beginning of the eighteenth century saw the general recognition of the rule that non-combatants were not to be subjected to slaughter or outrage. But nevertheless many severe practices for which no reasonable justification could be pleaded still remained as survivals of the older order. Thus the inhabitants of invaded districts were often compelled to swear fidelity and allegiance to the invading sovereign, and sometimes even to renounce their allegiance to their lawful rulers, and furnish recruits for the forces of the invaders. The

[1] Bernard, *Growth of the Law of War* in the *Oxford Essays for 1856*, pp. 97–99, 130–133.

treatment accorded to non-combatants according to the best rules and practices of modern warfare may be described under the heads given in the sections that follow. Most of the rules contained therein are taken from the Acts of the two Hague Conferences and other law-making international documents; but some are generalizations from usage, and as such more liable to be doubted and contested.

§ 168

The first rule we lay down with regard to this portion of our subject is that

*Non-combatants are exempt from personal injury, except in so far as it may occur incidentally in the course of the lawful operations of warfare, or be inflicted as a punishment for offences committed against the invaders.*

The exemption of ordinary non-combatants from personal injury.

Family honor and the lives of individuals are always to be respected. Yet if civilians travelling in a train containing soldiers are shot in an attack upon it by the enemy, or if women, children, and unarmed men are killed in the course of a bombardment, or during the capture of a village situated upon a battlefield, a regrettable incident has taken place, but no violation of the laws of war has been committed. Had the guns of the besiegers been deliberately turned upon the dwelling houses of the bombarded town, or had an open and undefended village been fired into, the persons responsible for such proceedings would have been justly accused of illegal barbarity. A custom is springing up of allowing women and children to leave a besieged place before the commencement of a bombardment, but it is not sufficiently general to have acquired binding force. During the siege of Strasburg in 1870 the Germans on two occasions allowed non-combatants to pass through their lines into a place of safety; but a few months later they declined to permit "useless mouths" to depart from Paris before the bombardment commenced, because it was the intention of their commanders to reduce the city by famine rather than capture it by fighting. All that is rendered obligatory on an enemy

commander by the Hague code for land warfare [1] and the Hague Convention concerning bombardments by naval forces [2] is that he should give notice to the local authorities before commencing his bombardment, except when military exigencies, such as a contemplated assault, make such warning impracticable. [Non-combatants in districts under the military occupation of an invader are dealt with later.][3]

§ 169

The next point to be noticed with regard to the treatment of non-combatants is that

*The inhabitants of captured towns are not to be abandoned to the violence of the victorious soldiery.*

The cessation of the barbarities inflicted upon the inhabitants of captured towns.

Such atrocities as the sack of Magdeburg in 1631, when thirty thousand people—men, women, and children—were massacred with every circumstance of cruelty by Tilly's troops amidst the wreck of their burning homes, would be impossible to-day in warfare between civilized states. But scenes not greatly inferior in horror have occurred since. During the Peninsula War, the successful assaults on Cuidad Rodrigo, Badajos, and San Sebastian were followed by terrible excesses perpetrated by a maddened soldiery upon the defenceless inhabitants. The French in 1837 sacked Constantine in Algeria for three days. The invariable excuse put forth on such occasions was that the troops could not be restrained. But whatever truth there may have been in it ages ago, it is no longer applicable to armies recruited from the populations of the leading nations of the world, who pride themselves upon their humanity and enlightenment. The only conspicuous instance to the contrary in recent years occurred in 1894, when at the capture of Port Arthur the Japanese troops, maddened by the sight of the quivering bodies of their compatriots tortured to death by the retreating Chinese, gave themselves up for a time to indiscriminate slaughter. But when early in 1905 the soldiers of Japan captured Port Arthur again, they

[1] See Article 26. [2] See Article 6. [3] [See § 177*a*.]

showed a clemency and kindness worthy of the highest praise. The plea that the assaulting troops must be rewarded for their exertions by the plunder of the captured place is simply infamous, and as ignorant as it is evil. Towns are now defended by forts and earthworks erected at a considerable distance from the houses. There is therefore but little danger of the rush of an infuriated soldiery into the streets after a successful assault. In the American Civil War, for example, Richmond fell as soon as the lines of Lee were pierced at Petersburg; and before the soldiers of the Union could reach the city the Confederates had time to evacuate it, after setting fire to the government stores and thus causing the destruction that their victorious foes endeavored to prevent. And while both the temptations to excess and the opportunities for it are less than before, the sentiments that have caused the general improvement in the laws of war have not left untouched the department of them that deals with sieges and assaults. The Brussels Conference of 1874 began the process of making mercy obligatory by laying down that captured towns were not to be plundered, and Article 28 of the Hague Regulations of 1907 completed it by forbidding the "pillage of a town or place even when taken by assault."[1] All the rules we have already given with respect to the protection of the peaceful population from outrage and molestation apply as a matter of course to its inhabitants.

§ 170

The last point to be noticed in connection with non-combatants is that

*Special protection is granted to those who tend the sick and wounded.*

[This has been described in § 165.]

[1] Higgins, *The Hague Peace Conferences*, pp. 237, 275.

## CHAPTER IV

### THE LAWS OF WAR WITH REGARD TO ENEMY PROPERTY ON LAND

§ 171

UNDER the above head we will first consider the case of *Enemy property found within a state at the outbreak of war.* Such property may belong to the enemy state or to its subjects. The first case is exceedingly unlikely to arise except perhaps with regard to an ambassador's residence, which is sometimes owned by the state that sends him. But as a general rule a state does not in its corporate capacity own real property in its neighbors' territories, and if it should possess personal property so situated, it would take care to withdraw any of its goods and chattels that were in the power of a probable foe as soon as relations became so strained that war was likely to break out. It is, however, just possible that the commencement of hostilities might find public ships, or treasure, arms and military stores belonging to one belligerent, still remaining within the territories of the other. In that case they would undoubtedly be confiscated; but such things as books, pictures, statues, curios, and ancient manuscripts, would probably be regarded as exempt from the operations of warfare and restored accordingly. And it is improbable that any civilized state would confiscate a house owned by its enemy, if it was acquired for the residence of his diplomatic representative, and used for that purpose in time of peace.

Property of the enemy government found within a state at the outbreak of war.

§ 172

At the outbreak of war a state frequently discovers within its borders a considerable amount of private property belonging to subjects of the enemy. In dealing with such cases we shall find it convenient to give separate consideration

to real and personal property, and to take first the case of real property or immovables. The mediaeval rule was to confiscate such property as soon as hostilities began, and not till the commencement of the eighteenth century do we find germs of the contrary practice. By the middle of the century Vattel[1] was able to limit the rights of a belligerent to the sequestration during the war of the income derived from such lands and houses within his territory as belonged to subjects of the hostile state. During the latter half of the century general custom followed this rule, but towards the close of it we find in treaties of peace provisions for the removal of the sequestrations, a sure sign that even the less severe mode of dealing with the property in question was beginning to be condemned by enlightened opinion. The growth of the practice of allowing enemy subjects resident in a country to continue there unmolested during the war[2] carried with it permission for them to retain their property; and in modern times the real property of enemy subjects has not been interfered with by the belligerent states in whose territory it was situated, even when the owners resided in their own or neutral states, the one exception being an Act of the Confederate Congress passed in 1861 for the appropriation of all enemy property found within the Confederacy, except public stocks and securities.[3] This proceeding was deemed unwarrantably severe; and contrary usage has been so uniform that we may safely regard the old right to confiscate as having become obsolete through disuse. [The practice of sequestration during the great war is stated in the next section.]

Real property of enemy subjects found within a state at the outbreak of war.

§ 173

Personal property or movables remained subject to confiscation if found in an enemy's country at the outbreak of war for some time after mitigations of the old severity began to be applied in the case of real property. But we find indications of a change of sentiment in numerous treaties nego-

[1] *Droit des Gens*, bk. III, § 76. [2] See § 160.

[3] Halleck, *International Law* (Baker's 4th ed.), vol. I, p. 589, note.

tiated during the eighteenth century, whereby each of the contracting parties agreed to grant to subjects of the other a fixed period for the withdrawal of mercantile property, should war break out between them. These stipulations have been followed by others extending up to the present time. They mark a considerable advance; but some of them refer only to movables connected with commerce, and leave other kinds of personal property unprotected. Moreover, till the end of the Napoleonic wars the mediaeval rule of confiscation was often applied in the absence of special stipulations overriding it. But it was too severe for public opinion; and in the treaties of the time there are numerous provisions for mutual restoration at the conclusion of peace.[1] Since the treaties of Vienna of 1815 the only instance of confiscation is to be found in the Act of the Confederate Congress alluded to in the previous section.

Personal property of enemy subjects found within a state at the outbreak of war.

This being the state of the facts, what are we to say as to the state of the law? The doctrine of the British and American courts, that war renders confiscable enemy property found within the state at the outbreak of war, but does not *ipso facto* confiscate it, was regarded as good in International Law at the beginning of the last century. It was laid down by the Supreme Court in the case of *Brown* v. *the United States*,[2] when it was further decided that by the Constitution an Act of Congress was necessary to effect confiscation or authorize the President to confiscate, whereas in Great Britain a Royal Proclamation was sufficient. But it may be questioned whether the old right is still in existence. For more than a century it has not been acted on, save in the one instance of 1861; and the circumstances under which this solitary return to former severity took place deprive it of much weight as a precedent for international action. What is done by the weaker party in a bitter civil war is hardly a guide for ordinary belligerents in a struggle between independent states. If it is a right to argue from the practice of nations to the law of nations, we may join the

[1] Hall, *International Law*, 7th ed., § 139.

[2] Cranch, *Reports of U. S. Supreme Court*, vol. VIII, p. 110; Scott, *Cases on International Law*, pp. 486–493.

great majority of continental publicists[1] in the assertion that the International Law of our own time does not permit the confiscation of the private property of enemy subjects found on the land territory of the state at the outbreak of war. [The English Court of Appeal recently decided *In re Ferdinand, Ex-Tsar of Bulgaria*[2] that the right of the Crown to confiscate has not been abolished by disuse, but that nevertheless the Trading with the Enemy Acts passed during the great war supersede this right so long as they remain in force. The decision is not inconsistent with the view that in International Law the right of confiscation (whether it exists or not) will not be enforced. For the Crown's right of confiscation is enforced by rather clumsy machinery, and this makes its continued supersession by Trading with the Enemy Acts probable in future wars; and in not one of those acts[3] is any express power of unqualified confiscation conferred. They do not go beyond sequestration.] The right to seize and appropriate is obsolete, except perhaps with regard to objects directly useful in war, which might be detained lest they should reach the enemy and swell his resources. In order to meet such a danger, it might be wise to retain in the constitutional law of the state a power of sequestration, to be exercised on rare occasions and with regard to special kinds of property. But no power of confiscation is needed; nor would its exercise be endured to-day, when capital is cosmopolitan and there are few civilized countries without a considerable population of resident foreigners. International Law should allow, under careful limitations, a right to sequestrate, but nothing more. [Sequestration was the rule during the great war. In Great Britain, by one of the Trading with the Enemy Acts, 1914, provision was made for creating a custodian in whom enemy property whether real or personal might be vested, and who was to hold such property until the termination of the war, and then deal with it as the Crown should direct.[4] In France, sequestrators with similar powers were ap-

[1] For a summary of their views see Latifi, *Effects of War on Property*, p. 40.

[2] [L. R. [1921], [Ch. 107.]

[3] [1914, 1915, 1916, 1918.]

[4] [5 Geo. v, c. 12.]

pointed, whose duty was to preserve the enemy property which they acquired. Bulgaria, Roumania, Italy, and Russia also issued sequestration orders.[1] The policy of the United States was in its general lines like that of Great Britain and France. Germany made no sequestration order during the first month of the great war, but on September 4, 1914, incensed by the British and French sequestrations, she retaliated with an order putting enemy undertakings in the hands of controllers, who were directed to respect private property and other rights in connection therewith. Austria, by an edict of October 16, 1914, followed the suit of Germany.][2]

An attempt was made in 1817 by the British Court of King's Bench to enforce in the case of private debts a rule of non-confiscation, and thus give them a more privileged position than other kinds of personal property. But the claim is not considered by most writers to have been sound when it was made, and [the case was distinguished, if not discredited, *In re Ferdinand, Ex-Tsar of Bulgaria*].[3] But while no difference would be made to-day between the various kinds of personalty, the mild rule for which Lord Ellenborough, the then Chief Justice, contended in the case of debts in 1817 would probably be applied generally.[4] In states that retain the doctrine that an enemy has no *persona standi in judicio* he cannot sue for his debt during the war, but [with certain exceptions, e.g., where the contract involves intercourse with the enemy, or is contrary to public policy] the right to do so revives at the conclusion of peace. In the United States a statute of limitations does not run during war against those who have no right of access to the courts. [Whether English law is the same is not certain. There is no decision on the point, but the better opinion at the present day seems to be that the statute of limitations does not run during the war.[5] After the great war, it was provided by

[1] [Fauchille, *Droit International Public*, vol. II, § 1058[1].]

[2] [*Ibid.* Garner, *International Law and the World War*, vol. I, §§ 68–72.]

[3] [L. R. [1921], [Ch. 107.]

[4] *Wolff* v. *Oxholm.* Maule and Selwyn, *King's Bench Reports*, vol. VI, p. 92; Scott, *Cases on International Law*, pp. 496–499.

[5] [Pollock, *Contract*, 9th ed., p. 101 note (s). McNair, *Legal Effects of War*, p. 61.]

the treaties of peace with Germany, Austria, Hungary, Bulgaria, and Turkey (unratified) that periods of limitation should be regarded as having been suspended during the war.]

## § 174

The special case of stock held by enemy subjects in the public debt.

There is one kind of personal and incorporeal property which is clearly exempt from confiscation. There can be no doubt that long usage, and a due regard for self-interest, compel belligerent states to refrain from confiscating the stock held by subjects of the enemy in their public loans, and to pay the covenanted interest on such stock during the continuance of the war. The question came up for discussion during the famous Silesian Loan Controversy [1] between Great Britain and Prussia in the middle of the eighteenth century. In the year 1752 Frederick the Great of Prussia confiscated funds due to British subjects in respect of a loan secured upon the revenues of Silesia. The money had been originally lent to the Emperor Charles VI; but when Silesia was ceded to Prussia in 1742 by Maria Theresa, his successor in the Austrian dominions, Frederick agreed to take upon himself all the obligations connected with the loan. Ten years after he laid hands upon the property of the British stockholders, in retaliation for the capture and condemnation by Great Britain of neutral Prussian merchantmen under circumstances deemed unlawful by the jurists whom he consulted. The British Government replied to their arguments in a masterly state paper, due chiefly to the pen of Murray, the Solicitor-General, who was afterwards the great Lord Mansfield. He showed that war itself had not been held to justify reclamations on the public debt, and argued that a lesser injury, if injury there had been, could not give just ground for so unprecedented a severity. By almost universal consent the British contention was triumphant. Undoubtedly Prussia had a real grievance against Great Britain; for British prize courts had condemned Prussian vessels carrying materials for shipbuilding, though the British Minister for Foreign

[1] C. de Martens, *Causes Célèbres*, vol. II, pp. 1–87. [Sir E. Satow, *The Silesian Loan* (1915).]

Affairs had declared to the Prussian envoy that such cargoes would not be regarded as contraband.[1] The controversy was settled in 1756 by the Treaty of Westminster, whereby Prussia agreed to remove the sequestration placed upon the Silesian Loan, and Great Britain covenanted to pay an indemnity of £20,000 for the benefit of Prussian subjects who had suffered wrongfully by her captures. The unbroken practice of civilized states for generations past renders the principle that stock in the public debt held by enemy subjects should be exempt from seizure, an undoubted rule of modern International Law. The real reason for the rule is probably to be sought rather in the exigencies of public credit than in the sanctities of public faith. It is difficult to see how the obligations undertaken by a state with regard to the money it has borrowed are more sacred than its other obligations towards private individuals. But there is no difficulty in understanding that the rate of interest on a loan which might be confiscated in the event of war between the borrowing country and the country of the lender would be very much higher than the rate on an unconfiscable stock. States desire to borrow on as easy terms as possible, and therefore they are glad to give lenders the benefit of the most complete security. [During the great war, all the belligerent states suspended payment of interest on their public debts due to enemy subjects. After peace was established, such sums were recoverable, so far as Germany and the United Kingdom were concerned, through the clearing offices established by the Treaty of Peace.][2]

## § 175

Booty.

Having dealt with the various kinds of enemy property found within a belligerent state at the outbreak of war, we now pass on to consider the treatment to be accorded by an army to movables and immovables under its control, if they are tainted with the enemy character. In this connection, we will deal first with

[1] Manning, *Law of Nations* (Amos's ed.), pp. 175, 176, 292–294.

[2] [Fauchille, *Droit International Public*, vol. II, § 1058.[1] *British Year Book of International Law* (1920–1921), p. 178.]

*Booty,*

which may be described as movables taken from the foe on the battlefield, or in the course of such warlike operations on land as the capture of a camp or the storming of a fort. But the scope of this definition has been greatly diminished by the Hague Regulations concerning the Laws and Customs of War on Land. The fourteenth article declares that all valuables and objects of personal use found on battlefields are to come into the custody of the Information Bureau [1] and be by it returned to those interested; and the fourth article lays down that the personal belongings of prisoners, save only their arms, horses, and military papers remain their property.[2] That these limitations are not counsels of perfection, but practicable rules, was proved by Japan in her war of 1904–1905 with Russia, when she sent back through French diplomatic and consular channels over a million articles, including coins, found on the field, or left by deceased prisoners of war.[3] This took place under the Hague code of 1899; but the code of 1907 now in force differs in no respect from its predecessor in the provisions that bear on the subject.

By the strict rules of International Law booty belongs to the state whose soldiers have captured it. They are acting as the agents and instruments of their government. What they do is done by its authority, and what they acquire is acquired on its behalf. War gives them no right to enrich themselves at the expense of the enemy. The spoil they take is not theirs but their country's. This was the ancient Roman theory, and it is the theory of the modern law of nations. But in practice, the regard paid to it is by no means as strict as could be wished, and it is impossible to prevent the appropriation of many articles taken as spoil of war. Recognizing this, the laws of every civilized state provide that the whole or a part of the captured property should be given to the captors according to a scale drawn up by the proper authorities. In

[1] See § 164.

[2] Higgins, *The Hague Peace Conferences*, pp. 221, 229.

[3] Takahashi, *International Law Applied to the Russo-Japanese War*, p. 121.

England the distribution of booty is determined by the Crown under the advice of the Lords of the Treasury.[1] In order that proprietary rights in booty may vest in the state whose soldiers capture it, they must have had it in firm possession for twenty-four hours. If it is recaptured by the enemy before that time, it reverts to the original owners, on the theory that they have not been dispossessed of their proprietary rights in it. Such state property as arms, stores, and munitions of war, found in a captured camp or fort, or on a battlefield. belongs to the government of the victors.

## § 176

We have next to investigate the important subject of

*Belligerent Occupation.*

Invasions historically considered.

Much light will be thrown upon the question by a short historical review of the methods followed by invading armies when dealing with property in the districts overrun by them. It is not to be supposed that in ancient and mediaeval warfare property would be spared where life was freely taken. Accordingly we find unlimited plunder and destruction the rule not only in classical times, but also in periods far more nearly approaching our own. When the English under Edward III landed in Normandy in 1346, they spread themselves over the country, burning and plundering up to the very gates of Paris. The French invasions of Italy at the end of the fifteenth and the beginning of the sixteenth centuries were undertaken without magazines or money. The troops lived on the country, which they ate up like locusts. The atrocities of the Thirty Years' War are too well known to need description. Even Grotius was obliged to admit that "by the Law of Nations . . . any one in a regular war may, without limit or measure, take and appropriate what belongs to the enemy."[2] But when he endeavored to enforce *temperamenta belli*, he argued that even in a just war men should not capture more than was necessary

[1] Halleck, *International Law* (Baker's fourth ed.), vol. II, pp. 94, 95.

[2] *De Jure Belli ac Pacis*, bk. III, ch. vi, 2.

for their own safety, unless it was morally due to them either as a debt or by way of punishment. He added that the injured side, if it abounds in wealth, should not exact the utmost farthing, and spoke with approval of the custom of sparing the lands of cultivators and the goods of merchants, and only taking tribute from them.[1] Rules based upon the notion that war is a punishment have not found their way into International Law; but the other idea of Grotius that the invader should measure his acquisitions by his necessities was fruitful of good. In the next great cycle of European wars Marlborough and Eugene and their French opponents kept strict discipline in their armies. Requisitions took the place of indiscriminate plunder, and the avocations of peaceful life went on amidst the movements of the contending forces. Yet now and again the old ferocity broke out, though on each occasion it shocked the conscience of Europe. For instance, in 1688 the Palatinate was devastated amid general execration by the order of Louis XIV and his minister, Louvois; and in 1704 Marlborough ordered a part of Bavaria to be laid waste, in order to punish the Elector for adhering to the French alliance and to induce him to quit it.[2]

But though measures so extreme as these were looked on with disfavor, many proceedings which we should now deem indefensible evoked little hostile comment. In 1715 the King of Denmark, being at war with Sweden and having overrun with his troops the Swedish territories of Bemen and Verden, sold them to the Elector of Hanover, thus assuming to himself such a right of dominion as, according to modern usage, could spring from nothing but cession or completed conquest. Later still, during the occupation of Saxony by Frederick the Great in the Seven Years' War, recruits were taken by force for the Prussian army from the population of the occupied kingdom.[3] In so far as any legal justification for such proceedings was attempted, they were defended on the theory that military possession, however temporary, was a

[1] *De Jure Belli ac Pacis*, bk. III, ch. xiii.

[2] Bernard, *Growth of Laws of War*, pp. 101–104; Hosack, *Law of Nations*, pp. 260, 261.

[3] Hall, *International Law*, 7th ed., § 154.

kind of conquest and gave the invader full proprietary rights. The practical result of this view was to confer on him all the power of a sovereign without a sovereign's responsibility. Vattel, writing in 1758, was the first jurist to challenge the theory that a military possessor might perform acts of sovereignty, and to maintain instead that the rights of the original sovereign must first be ousted by completed conquest, or resigned by a definite treaty.[1] His views gradually found favor with other jurists and slowly influenced practice; but, as Oppenheim remarks, it was not till the end of the nineteenth century that they were worked out in all their consequences, and fully embodied in the accepted rules of land warfare.[2] Meanwhile humanity and enlightened self-interest combined to substitute for plunder a right to requisition from the inhabitants things necessary for the daily needs of the invading army, and a right to levy money contributions in the occupied territory. But humane commanders often found that they had a hard task in their attempts to stop pillage. When the Duke of Wellington entered the south of France in 1813 his prohibitions of plunder and license were often disregarded. He, therefore, threatened to send back the Spanish troops if they persisted in attempts to retaliate on French peasants for the havoc wrought in Spain by the armies of Napoleon. With his own troops he was still more severe. He sent to England under arrest several officers who had been guilty of marauding, and hanged private soldiers who plundered in defiance of his orders.[3]

The last century witnessed a gradual improvement in the behavior of civilized armies. The general feeling in favor of the more definite assertion of existing restrictions and the creation of fresh safeguards found expression in the various military codes and projects of international regulation that marked the latter part of the nineteenth century. Pillage was prohibited and the rights of the invader over public and private property were limited and defined in the Instructions of 1863 for the

[1] *Droit des Gens*, bk. III, §§ 197, 198.
[2] *International Law*, vol. II, § 166.
[3] Napier, *Peninsula War*, vol. VI, p. 268.

Government of Armies of the United States in the Field, which was the first of the military codes,[1] in the project drawn up by the Brussels Conference of 1874,[2] and in the rules agreed to by the Institute of International Law in 1880.[3] Then in 1899 came the First Hague Conference with its great law-making Convention concerning the laws and customs of war on land, and the appended series of Regulations. In 1907 the Second Hague Conference issued revised Regulations, and these may now be regarded as binding between civilized states. The International Law of to-day draws a sharp distinction between completed conquest and belligerent occupation. The former we have already considered.[4] It implies the cessation of the struggle and the establishment of a new political order. With the rights and obligations arising out of it the laws of war have no concern. But with the proceedings of invading armies, and the legal position of the military occupant they are most intimately connected. We will proceed to indicate what they prescribe with regard to these matters, using the Hague Regulations of 1907 as our guide.

## § 177

The essential elements of military occupation.

The Regulations prohibit as applicable to all warfare on land the destruction or seizure of the enemy's property unless it be imperatively demanded by the necessities of war, the attack or bombardment of undefended places, and the pillage of a place even when taken by assault.[5] They then proceed to declare that "territory is considered to be occupied when it is actually placed under the authority of the hostile army," and that "the occupation applies only to the territories where such authority is established and can be exercised."[6] These words might be more explicit with advantage; but when they are read in the light of the discussions that were carried on at Brussels in 1874 they are fairly clear. They certainly rule out the view acted

[1] Davis, *Outlines of International Law*, Appendix A.
[2] Higgins, *The Hague Peace Conferences*, pp. 273, 274, 278, 279.
[3] *Tableau Général de L'Institut de Droit International*, pp. 181–185.
[4] See §§ 49, 77. [5] See Articles 23, 25, 28. [6] See Article 42.

on by the Germans in their invasion of France in 1870, that a district was occupied if flying columns, advanced parties, or even scouts and patrols, marched through it either without resistance, or after having overcome the resistance of the regularly organized national troops.[1] In such territory the authority of the invaded state is still in existence, and has not been superseded by that of the hostile army. Very likely this will happen almost immediately; but till it has happened the invader has not gained the large rights that belong to a military occupant. In fact occupation on land is analogous to blockade at sea; and as blockades are not recognized unless they are effective, so occupation must rest on effective control. Its rights are founded on mere force, and therefore they cannot extend beyond the area of available force. But the force need not be actually on the spot. The country embraced within the invader's lines may be very extensive, and the bulk of his troops will, of course, be found on its outer edge opposing the armies of the invaded state. Any territory covered by the front of the invaders should be held to be occupied, but not territory far in advance of their main bodies. The fact that it is penetrated here and there by scouts and advance guards does not bring it under firm control, and therefore cannot support a claim to have deprived the invaded state of all authority therein. But the rights of occupancy, once acquired, remain until the occupier is completely dispossessed. The temporary success of a raid or a popular rising will not destroy them; but if an insurrection wins back and holds the disputed territory, it is absurd to argue, as do some of the great military powers, that they still exist because the occupying forces have not been driven away by regular troops. This is one of the questions untouched by the Hague Regulations, and, therefore, left by the preamble of the fourth Convention of 1907 to usage, humanity, and "the requirements of the public conscience." These combine to declare that rights founded on force expire when that force is overcome, no matter what agency be employed in overcoming it. It is impossible to travel with safety far beyond the statement that belligerent occupation implies,

[1] British Parliamentary Papers, *Miscellaneous*, No. 1 (1875), pp. 235–239.

first firm possession, so that the occupying power has the country under its control and can exercise its will therein, and secondly a continuance of the war, so that the invader has not become the sovereign. While the occupation lasts, the occupant has duties as well as rights. He must substitute his own authority for that of the state he has dispossessed, maintain order, ensure safety, and administer the laws with such alterations, if any, as he may deem it necessary to make by virtue of his military supremacy.[1] [It has been said that the German occupation of Luxemberg in the great war was peculiar, because it was not an occupation of enemy territory, nor did Germany by seizing its lands make Luxemberg one of its allies, for the latter always protested its neutrality.[2] The truth of the matter seems to be that German acts in Luxemberg were not military occupation at all, but one continuous and flagrant breach of Luxemberg's permanent neutralization. Military occupation is incidental to war, and here there was no war, for Luxemberg had no army, and could do no more than assert her energetic complaints of Germany's illegal acts.]

## § 177a

The peaceful inhabitants of an invaded country, who are content to go about their ordinary avocations and submit to the lawful demands of the invaders, have a right to protection. The exercise of their religion should be freely allowed, and the law of the land with regard to private rights should be permitted to remain in force. By Article 23 of the Hague code for land warfare a belligerent is forbidden to compel subjects of the other side to take part in "the operations of war directed against their own country," even if they were in his service before the outbreak of hostilities. The full meaning of the phrase "operations of war" is by no means clear; and there has been a good deal of controversy as to whether the practice of impressing inhabitants of an invaded district to act as guides to the advancing columns is really prohibited. The words

Rights over inhabitants of occupied territory.

[1] Holland, *The Laws of War on Land*, pp. 52, 53.

[2] [Fauchille, *Droit International Public*, vol. II, § 1167 2.]

just quoted seem wide enough to cover such an act of compulsion. But the main argument of those who desire the cessation of a severity common enough hitherto is that Article 44 condemns it. The words are, "Any compulsion on the population of occupied territory to furnish information about the army of the other belligerent, or about his means of defence, is forbidden," and the most natural meaning to put on them is that they specify a particular instance of what is already prohibited in general terms by Article 23. Because of the dangers deemed to lurk in this particularity Germany entered a reservation against the article,[1] and not because she shared the desire of Austria-Hungary and Russia to be free to employ impressed guides.[2] Yet in the admirable report of the French delegation this article is praised on the ground that it solemnly prohibits so odious a practice.[3] The emphatic rejection of an Austro-Hungarian amendment which would have allowed it, and indeed the whole course of the discussion, show that the practice was prohibited;[4] but we shall find the prohibition in the general statements of Article 23 and Article 52 rather than in the particular assertions of Article 44. [As several of the belligerents in the great war had not ratified Article 44, it was not binding then, and the author's view that Articles 23 and 52 include by implication what is expressly mentioned in Article 44 seems to be a strained interpretation of the Convention.][5]

Though the inhabitants of invaded districts are to be free from compulsion to take any part in the operations of war against their own country, they may be forced to render services for the needs of the army of invasion. The line between the two may sometimes be very thin; and no doubt controversy will arise over doubtful cases. But the underlying principle is

[1] German White Book, Dec. 6, 1907, p. 7; *Deuxième Conférence Internationale de la Paix, Actes et Documents*, vol. I, p. 86.

[2] *Actes et Documents*, vol. I, pp. 99–101; British Parliamentary Papers, *Miscellaneous*, No. 4 (1908), pp. 102–104.

[3] French Yellow Book, *Deuxième Conférence Internationale de la Paix*, p. 107.

[4] *Ibid.*, p. 76; Higgins, *The Hague Peace Conferences*, pp. 265–270.

[5] [Cf. Garner, *International Law and the World War*, vol. II, § 401. Oppenheim, *International Law*, vol. II, p. 239 *n.*]

clear. To drive a herd of bullocks into a slaughter pen is a very different thing from driving an ammunition wagon into a field of conflict [or forcing the inhabitants to dig trenches exposed to hostile fire, as the Germans forced the Belgians to do in the great war]. To share house and home with a few soldiers of the enemy is far less obnoxious to patriotic feeling than to be compelled with a revolver at one's head to lead a hostile division over a mountain path to the flank of the defending army. [The border-line cases which occurred during the great war seem to show that though the general vagueness of the phrase "military operations" in Article 23 is inevitable, yet it might be well to amend the article by specifying in it particular compulsory services as illegal. It could be made clear that these were examples only, and not intended to be exhaustive. Thus it would set at rest the vexed question whether the occupier may compel the inhabitants to work the railways, as was the German practice in the occupied districts of Belgium.] Pillage is forbidden, and private property must be respected. The population may not be called upon to take the oath of allegiance to the hostile power; neither may any general penalty, pecuniary or otherwise, be inflicted on it because of acts of individuals for which it cannot be regarded as collectively responsible. But the protection and good treatment accorded to non-combatants is conditional on good behavior from them. They must not perform acts of war against the invaders while purporting to live under them as peaceful civilians. An inhabitant of an occupied district who cuts off stragglers, kills sentinels, or gives information to the commanders of his country's armies, may be, and probably is, an ardent and devoted patriot; but nevertheless the usages of war condemn him to death, and the safety of the invaders may demand his execution. There is nothing to this effect in the Hague Code. It was one of those questions on which agreement proved impossible at Brussels in 1874, and has remained impossible ever since. All that could be settled in 1907 was that such matters were to be ruled by custom, the laws of humanity, and the requirements of the public conscience.[1] But there can be no

[1] See the preamble to the fourth Hague Convention of 1907.

doubt as to accepted usage. Every citizen of an invaded province can be either a combatant or a non-combatant. If he elects to fight, he must join the armed forces of his country, and will be entitled to the treatment accorded to soldiers. If he prefers to be a peaceful civilian, and to go about his ordinary business, the enemy will be bound to leave him unmolested and protect him from outrage. But if he varies peaceful pursuits with occasional acts of hostility, he does so at the peril of his life.[1] [Many violations of the Hague regulations were committed by Germany during her occupation of parts of Belgium and France in the great war. It is generally admitted that unnecessary interference with educational institutions by the invader is unlawful. Yet the Germans reorganized the University at Ghent to suit their purpose of making the Flemish part of Belgium a German dependency. They also interfered with Belgian law and its administration far beyond the requirements of military necessity. They took the harshest view of "war-treason" as applied to acts hostile to their authority committed by the Belgians. And this severity became brutality in the case of the English nurse, Edith Cavell, who was executed for concealing British and French soldiers and aiding them and Belgians of military age to escape so as to rejoin their national forces. Miss Cavell was certainly not a spy,[2] and though she had committed an offence against the invader's regulations, it is doubtful whether her acts fell under the German law which made punishable with death "guiding soldiers to the enemy," and the trial itself was little more than a travesty of legal procedure. The consequences of this execution were striking evidence of its folly, to say nothing more of its dubious legality. It excited general detestation in neutral states, and it directly increased recruitment for the British armies. Just as impolitic and more certainly unlawful was the cruelest act done by the Germans in the occupied districts

[1] For the Hague Regulations referred to in this section see Higgins, *The Hague Peace Conferences*, pp. 232–237, 244–249; Whittuck, *International Documents*, pp. 43–45, 47–49; Scott, *The Hague Peace Conferences*, vol. II, pp. 386–391, 394–399; and *Supplement to the American Journal of International Law*, vol. II, pp. 106–108, 112–115.

[2] [See § 199.]

of France and Belgium, or indeed by any state in a modern war of invasion. This was the deportation of thousands of the inhabitants from their homes to Germany for employment in the labor market there. Germany's excuses that this was necessary partly in order to maintain public order in the occupied territory, partly to lighten the task of supporting the civilian population there, will not bear examination. The policy that prompted the deportations, the mode in which they were carried out, and the treatment of the victims when they reached Germany were disgraceful relapses to the barbarism of ancient warfare, and they only served to intensify bitterness of feeling and to steel resistance in France and Belgium.][1]

## § 178

We will now proceed to discuss the rights of an invader over property found in the districts occupied by him. It will be convenient to distinguish between state property and private property, taking first in each case the rules that relate to immovables, and secondly those that relate to movables.

Rights over state property gained by occupation.

With regard to immovables belonging to the invaded state, the occupying belligerent is to consider itself as an administrator and usufructuary only.[2] That is to say, it may use the public lands, buildings, and forests, and may take all the rents and profits arising from them, but may not waste or destroy the things themselves, save under stress of the most urgent military necessity. Thus the troops of the invader may be quartered in public buildings, his administrative services may utilize them for offices, they may be turned into hospitals for his wounded, and even the churches may be taken possession of for purposes connected with the war. But wanton destruction is regarded as an act of barbarity forbidden by the rules of civilized warfare. The Hague Regulations expressly forbid the seizure or destruction of institutions dedicated to public worship, charity, education, science, and art. Historical

[1] [Garner, *International Law and the World War*, vol. II, §§ 361–386, 400–402, 413–430. Fauchille, *Droit International Public*, vol. II, §§ 1155–1198 [3].]

[2] See Article 55.

monuments share their immunities, which include protection from wilful damage.[1] The rule that an invader acquires, not the ownership, but only the right to use the public immovables found by him in the occupied territory, carries with it as a necessary consequence the further rule that he may not sell any portion of the state domain that he succeeds in bringing under his control. He may compel the tenants to pay their rents into his military chest, he may lop the forests and work the mines, he may appropriate to himself all ordinary profits; but he may not injure or destroy the *corpus* of the property in question, nor may he attempt to transfer it. Such an attempt was made in 1870 by the German authorities [who purported to sell outright to Berlin bankers] some thousands of oaks in the state forests of two departments of France then under German military occupation. As the trees were [certainly not "fruits," but formed an integral part of the soil] the French courts ruled, after the conclusion of the war had restored their authority in the districts in question, that the buyers of the oaks had no legal title.[2] [The Germans were charged with the wholesale cutting of timber in the occupied districts of Belgium and France during the great war, and sending it to Germany for the manufacture of rifle stocks and use in carpentry.][3] With regard to immovables as distinct from their rents and profits, whatever the occupant may express on the face of any document, he can but make over his own chance of retaining what he then holds by the sword. Such a transaction cannot be valid against the sovereign of the country, if his authority is restored during or after the war, but it would bind the occupying sovereign if he afterwards obtained the district by cession or completed conquest. Purchase during the war by a neutral state amounts to an abandonment of neutrality, which the dispossessed belligerent may lawfully resent. If the excluded sovereign sells, he simply parts with his chance of regaining the

[1] See Article 56. [For the case of Louvain University, see end of § 180.]

[2] Scott, *Cases on International Law*, p. 674 note; Westlake, *International Law*, part II, p. 106 and note; Latifi, *Effects of War on Property*, p. 19.

[3] [Fauchille, *Droit International Public*, vol. II, § 1182. Garner, *International Law and the World War*, vol. II, § 398.]

property; and the conveyance, though valid as against him, would have no force to bind the invading state should its occupation ripen into full ownership. Even the right of user of the occupant is subject to exceptions; for the income derived from lands set apart for the support of "institutions dedicated to religious worship, charity, education, art, and science" should not be diverted from its beneficent purposes to swell the resources of the occupying army.[1]

With certain exceptions which will be stated immediately, movables belonging to the invaded state may be appropriated by the invader. Firm possession gives him a title to the things themselves, and not merely to the use of them. This rule applies first and foremost to "depôts of arms, means of transport, stores and supplies, and generally all movable property belonging to the state which may be used for military operations." But it also covers "the cash, funds, and realizable securities" of the government.[2] The exact meaning of the ambiguous term "realizable securities" (*valeurs exigibles*) has been much discussed among jurists.[3] Probably a security would not be accounted realizable unless it were capable of being converted into money as it existed at the moment of seizure. The occupant may collect the taxes, dues, and tolls payable to the state; but he must make the proper administration of the occupied territory the first charge on the funds so obtained,[4] and should employ the local officials if they are willing to act. Legal documents and state archives ought not to be seized unless they bear on the military dispositions of the enemy, or justify the contentions of the invader as to the origin and conduct of the war. And further, works of art or science, and historical monuments, are exempt not only from seizure, but also from wilful damage.[5] During the wars of Revolutionary and Napoleonic France large numbers of valuable pictures and statues were seized by the French armies, and

[1] See Article 56. [2] See Article 53.

[3] Westlake, *International Law*, part II, pp. 103, 104 and note.

[4] See Article 48.

[5] See Article 56. [See also end of § 180, and Garner, *International Law and the World War*, vol. I, p. 450.]

brought home to enrich the collections of Paris. Many more were given up as part of the price of peace by states who were overcome in war.[1] But in 1815 the victorious allies insisted on the restitution of all these works of art to the cities and galleries from which they had been taken. They held that they were undoing a great wrong. The captures, so they argued, were void *ab initio*, and it was their business when they had overcome the wrongdoer to put the true owners in possession again.[2] In reasoning thus they ignored the distinction we have pointed out between the two modes of acquisition. The laws of war, then as now, protected the contents of galleries and museums from seizure by invaders. Such of them as were taken by the French during their belligerent occupation of territories that they had overrun were obtained illegally, and the allies did no more than put the legitimate owners in possession of property that had never ceased to be theirs in law. But those that had been made over by treaty were held by a good title. It is absurd to argue that a victorious belligerent may enforce the transfer of a province, but not a picture, or that peace may be purchased by an indemnity of millions, but not by marbles and mosaics. To take away from France what she had acquired by cession was no act of police jurisdiction, but a high-handed proceeding which must seek its justification in considerations of public policy. If the welfare of Europe demanded that she should be deprived of Belgium and the Rhenish provinces, it might also demand that the galleries of the Louvre should disgorge the accumulated glories of Western art. This branch of the question must be argued on political and ethical, rather than on jural grounds.

[The treasures of art, history, and archaeology, which were robbed from France and Belgium during the great war by the German armies, from Italy by Austria, and from Serbia and other countries by Bulgaria, were restored by the treaties of peace. The appropriation of them was mere spoliation, and there was no pretence of any cession by their owners to the invaders who seized them.][3]

[1] Fyffe, *Modern Europe*, vol. I, pp. 117, 118, 132.

[2] Cf. F. von Martens, *Nouveau Recueil*, vol. II, p. 632.

[3] [Fauchille, *Droit International Public*, vol. II, § 1180. *History of Peace Conference of Paris*, vol. III, p. 233, vol. V, pp. 232, 328.]

§ 179

We now come to the rights of the occupying state over private property in the occupied districts. Dealing first with immovables, we may lay down that as a general rule they are held to be incapable of appropriation by an invader. They are bound up with the territory. The profits arising from them are free from confiscation, and the owners are to be protected in all lawful use of them.[1] But troops may be quartered in private houses, though the inhabitants may not be ejected from their homes to make more room for the soldiery. Moreover, the needs of actual conflict may justify the destruction of buildings or the use of them as fortified posts. And if non-combatants fire upon the invading forces from their dwellings, or use them for the purpose of committing other acts of unauthorized hostility, the laws of war give to the belligerent who suffers, the right to inflict punishment by the destruction of the property in question, as well as by severities against the persons of the offenders.

Rights over private property gained by military occupation.

Movable property belonging to the non-combatant population of occupied districts may not be seized unless it takes the form of arms, war material, appliances adapted for the transmission of news or for the transport of persons or goods, whether on land, at sea, or in the air. Even in these cases it must be restored at the conclusion of peace, and indemnities must be paid for it.[2] The heads given above include wireless telegraphy apparatus, aeroplanes and dirigible balloons, and the rolling stock of railways, when owned by individuals or companies. The reference to means of transport at sea was put into the text of the Regulation from which it is taken in order to deal with vessels seized by troops when in port or engaged in river navigation; for these come under the laws of land warfare. Ordinary cases of capture at sea were excluded by the phrase "apart from cases governed by maritime law." The question of the source of the indemnities to be paid at the conclusion of the war for the temporary use of the articles that

[1] See Article 46.

[2] See Article 53.

we are considering was left unsettled. No doubt, as Professor Holland remarks, "the treaty of peace must settle on whom the burden of making compensation is ultimately to fall."[1] The Hague Conference of 1907 dealt with a second case on the border between land and sea warfare, when on the motion of Denmark, which had been agitating the matter in international assemblies from the time of the Brussels Conference of 1874, it inserted in its laws of war on land the declaration that "submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They also must be restored and indemnities for them regulated at the peace."[2] The permission to cut or otherwise destroy the cable under stress of great military necessity can, of course, apply to the shore end only. Its treatment at sea comes under the rules of naval warfare. [There is a limited right to seize neutral railway material, which is described later.][3] The rules stated above show that the principle of immunity of private movables is jealously guarded, and when in great emergencies a temporary violation of it is permitted, the permission is accompanied by the imposition of a duty to provide compensation. We must, however, add that this immunity, like others we have considered, is conditional on quiet, peaceable, and regular behavior from the point of view of the military occupant. Seizure and destruction of personal property may follow on conviction of an offence against the rules laid down by the invader, such, for instance, as giving information to the dispossessed authorities, harboring their agents, or attacking their scouts and sentinels. Moreover, private movables are subject to severe, if orderly, exactions, which we will describe in the next section.

[When an occupier's troops are retreating from, or being driven out of, the occupied district, their duty to respect property remains what it was during the period of occupation, except that the destruction of objects likely to assist directly the enemy before whom they are retiring is allowed. The Germans went far beyond this when they evacuated parts of the occupied

[1] *The Laws of War on Land*, p. 57.
[2] See Article 54.
[3] See § 233.

territories in 1917 and 1918. Factories and mines and their plant, orchards and buildings were wantonly and indiscriminately ruined; and due reckoning for this was made in the treaty of peace.][1]

## § 180

The technical names for the exactions to which we have referred are *Requisitions, Contributions, and Fines.*[2] Strictly speaking, *requisitions* are articles of daily consumption and use taken by an invading army from the people of the occupied territory; *contributions* are sums of money exacted over and above the taxes, and *fines* are payments levied upon a district as a punishment for some offence against the invaders committed within it. But the two former terms are used interchangeably in a loose and popular sense to signify anything, whether in money or in kind, demanded by an occupying force from the inhabitants of the country it has overrun.

The special case of Requisitions, Contributions, and Fines.

The invader has an undoubted right to levy requisitions at his own discretion, and in most modern wars he has done so, sometimes leniently, sometimes severely. The Hague Regulations of 1907[3] limit the permissible demand to what is required "for the necessities of the army of occupation." These exactions are to be "in proportion to the resources of the country," and must not involve the inhabitants in operations of war against their own side. They can be demanded only "on the authority of the commander in the locality occupied." The demand should be made in writing, and receipts are to be given for the articles supplied. This is desirable in every case, as evidence of what has been taken. It is made obligatory when the supplies are not paid for in ready money. Such payment is recommended, but obviously the recommendation cannot be carried out always and everywhere. No commander would let his soldiers starve in the midst of plenty merely

[1] [Fauchille, *Droit International Public*, vol. II, § 1206 [2]. Garner, *International Law and the World War*, vol. I, §§ 211–213. Treaty of Versailles, 1919, Art. 45, 231–244 and Annexes.]

[2] [See on the whole topic Ferrand, *Réquisitions en Droit International Public* (1917).]

[3] [See Convention IV, Art. 52.]

because his military chest had been exhausted for the moment, or had not kept up with his march. But in order to secure that the inhabitants should eventually receive remuneration, the Hague Conference of 1907 added to the clause that directed receipts to be given, if cash was not forthcoming, another to the effect that the payment of the amount due should be made as soon as possible.[1] It did not, however, say from whom the payment was to come. The natural source is the side that received the supplies; but if it happens to be victorious, it may, as one of the conditions of peace, force its beaten adversary to provide the funds. Or it may find those whom it has beaten in the field so impoverished that it has to choose between leaving the country absolutely ruined or paying for the requisitions of both sides. Great Britain was confronted by these alternatives at the close of the Boer War in 1902, and she chose the latter. By the tenth article of the Peace of Vereeniging "all receipts given by officers in the field of the late Republics or under their orders," if found "to have been duly issued in return for valuable consideration," were to be received as evidence of the war losses, for the making good of which a sum of three millions sterling was granted.[2] In modern wars civilized armies carry with them vast trains of provisions and other supplies, and regard requisitions as a supplementary resource. But in the turmoil and confusion of the struggle, it often happens that the best organized services fail on special occasions, such as a forced march or an unexpected engagement, to satisfy the needs of the troops, and then what is wanted must be taken from the surrounding country. The collection is generally made through the local authorities, and only when they have fled, or when there is not time to set them in motion, are soldiers detailed to bring in what is required. In Manchuria during the war of 1904–1905 the Japanese applied a new method which reflects equal credit on their humanity and their ingenuity. In return for materials and services they gave military cheques, which could be exchanged for silver coin at stated times and places. They offered the standard prices of the district, as settled between their authorities and the Chi-

[1] See Article 52.

[2] *London Times*, June 3, 1902.

nese Chambers of Commerce. These were placarded in the towns and villages, and it was announced that whatever was requisitioned would be paid for at the rates in question. The result was that after a time the people used the cheques as paper money, and asked for no coin in exchange for them.[1] The plan, or some modification of it, might be generally adopted with great advantage. Most armies fix their own prices, which they do not put too high. Great Britain and the United States pay market rates, but as a rule leave them to be determined on the spur of the moment. The Japanese system avoids either extreme, and, in addition, solves the difficulty caused by the occasional absence of ready money.

Unlike requisitions, which may be demanded by the commander on the spot, contributions are not to be collected except on the responsibility of the General in command, and under a written order. He may levy them for the needs of the army of occupation, or for the expenses of the administration of the occupied territory. It will be remembered that the ordinary taxes are paid into the treasury of the invader, who is bound to use them for administrative purposes to the same extent as the dispossessed government. Unless, therefore, the yield from the usual sources of revenue is extraordinarily small, there will be no need of contributions for the everyday work of keeping order and doing justice between man and man. But the permission to take them for the needs of the army of occupation opens out a wide possibility of exaction. It is quite true that a contribution in money may sometimes be less irksome than a render in kind, and may indeed go further if the sum made over is spent in an advantageous purchase of supplies; but it is also true that a whole province may be impoverished by pecuniary demands that come within the letter of the Hague Regulations. Suppose, for instance, that a poor but warlike state invaded a neighbor and gained initial successes. It might maintain its forces and keep up their military equipment for a long time by constantly levying contributions "applied to the needs of the army." Thus the Napoleonic

[1] Takahashi, *International Law applied to the Russo-Japanese War*, pp. 260, 261.

principle of making the war support itself might be carried out with rigor, while the letter of the rules formulated at the Conferences of 1899 and 1907 was strictly observed. In this particular matter the Regulations protect inhabitants of occupied districts against pecuniary exactions levied merely for the enrichment of states or individuals; and doubtless this is a great gain. But, literally interpreted, they do not prevent a country from charging the largest share of the expenses of its war on the unfortunate inhabitants of districts overrun by its armies. In levying contributions, whatever may be the object in view, the assessment in use for the purpose of ordinary taxation is to be followed as far as possible, and receipts are to be given to the contributories.[1] But there are no provisions for repaying them, and they cannot expect anything of the kind, unless their own government, by way of equalizing burdens, gives them compensation after the war from the general taxation of the whole country, as France did in 1871 to those who had borne the brunt of the German exactions. [On any conceivable interpretation of the Hague Regulations as to requisitions and contributions, the Germans infringed them during the great war by the grossly disproportionate exactions in money and kind which they made in the occupied parts of France and Belgium. And far from taking food and supplies only for "the necessities of the army of occupation," they transported the surplus of what they got to Germany for use there and in other theatres of the war. In fact, Belgium seems to have been treated as a German storehouse. Frequently no payments were made for requisitions, no receipts were given in the great majority of cases, and even when they were given, they were usually irregular. The contributions levied on Brussels, Antwerp, and Courtrai alone during the first few months of the war amounted to one hundred million francs. It has been remarked as strange that the German *Kriegsbrauch im Landkriege*, or manual of instructions for the commanders in the field, does not mention the Hague Regulations as to requisitions and contributions. German policy during the war explains the omission. And it appears to have been followed by Austria in Italy and Rou-

[1] See Articles 48, 49, 51.

mania, though in a less degree because the opportunity of plunder was less.][1]

Fines, it will be remembered, are pecuniary penalties levied on places and districts by invaders, when they have found themselves unable to discover and bring to justice those who have committed offences against their safety therein. Article 50 of the Hague Regulations declares that "no general penalty, collective or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible." At first sight these words would seem to forbid all severities against local authorities or populations in the aggregate; but the last phrase points towards a modification of this view. For by prohibiting such penalties when the community cannot be held collectively responsible, it allows them inferentially when responsibility can be brought home. If a detachment occupying a village were slaughtered in the night while asleep, few would venture to argue that the community had no collective responsibility, should a conspiracy of silence baffle all attempts to discover the actual perpetrators of the massacre. On the other hand, if a train were derailed in the night while passing through a wild ravine far from human habitation, few would accept the doctrine that the population for miles around must have known of the deed and assisted in it directly or indirectly. It resolves itself into a matter of evidence, though the proof must necessarily be of that rough and ready kind which alone is possible in warfare. When the complicity of the inhabitants is evident either by direct proof or from the circumstances of the case, they are not protected by the article we are discussing, and retribution could hardly take a milder form than a pecuniary fine. The Germans in France during the war of 1870, and the British in South Africa during the Boer War, levied such fines when the responsibility of the population was more constructive than actual. But it must be noted that there was no Hague Code in existence when the former conflict was fought,

[1] [Ferrand, *Réquisitions en Droit International Public* (1917) pp. 434–449. Garner, *International Law and the World War*, vol. II, §§ 388–397. Fauchille, *Droit International Public*, §§ 1217,[1] 1226.]

and also that the Boer republics had not been allowed to take part in the Peace Conference of 1899, which made the rules it drew up binding on the signatory powers only in their wars with one another. In neither case, therefore, were the combatants under any obligation to observe the Hague Regulations. Had they been so bound, we may hold that they ought to have abstained not only from levying fines when it was impossible to bring home responsibility to the inhabitants generally, but also from other forms of collective penalty to which resort was sometimes had in the like case. We refer to the destruction of houses and farms and the compulsion put on the principal inhabitants to make them ride on the military trains running through their districts. Such severities may be justified under the terms of Article 50 when it is evident that the whole population sympathizes with the doers of the acts complained of and protects them from capture, but not otherwise. No general can be expected to sit down quietly and do nothing, while his sentinels and scouts are cut off, and his convoys intercepted in a district which is, in theory, engaged under his protection in the pursuits of peaceful industry. But he is bound to make every effort to discover the actual offenders, and only when he fails through the determination of the inhabitants to screen them ought he to apply such general penalties as fines, burnings, and the seizure of hostages. This view of the Hague Regulations that deals with the matter regards it as allowing reprisal in the form of general penalties when there is no doubt about collective responsibility, while forbidding anything of the kind if no such responsibility can be established. Oppenheim,[1] however, and also Holland,[2] take the ground that Article 50 has no bearing on reprisal, and simply provides for cases in which the question of it does not arise. If this view be correct, the commander of an occupying force is free to inflict any kind of severity on a district he has overrun, if only he bethinks himself of saying that it is done by way of reprisal for certain unlawful acts perpetrated by inhabitants or with their connivance. An article that can be

[1] *International Law*, vol. II, §§ 170, 248–250.
[2] *The Law of War on Land*, p. 55.

circumvented so easily is hardly worth enacting. It is better to deduce the exceptions to a rule from its own principles than to set it aside at will on account of extraneous considerations.[1] [In substance the author's view seems to be correct. What Article 50 does is to forbid the occupier to inflict a particular kind of punishment for a particular kind of offence against his authority, unless the inhabitants are proved to have connived at the offence. Whether we style this forbidden punishment a reprisal (as the author does), or give it any other name is of small moment so long as we realize that Article 50 forbids it. If we call it a reprisal, then to that extent, Article 50 modifies the law of reprisals. In other words that particular kind of reprisal must not be adopted in the circumstances put in the Article. The Article does not affect reprisals further or otherwise. It would be better to avoid using the word "reprisal" in this connection, and to say that Article 50 prohibits a special kind of punishment for a special kind of war-treason, that being a term which covers acts hostile to the occupier's authority in enemy territory.[2] If this be the interpretation of Article 50, there can be no doubt that many of the ruinous collective fines levied by the Germans during the great war on the towns in the occupied districts of Belgium and France were unlawful. One example will suffice. A Belgian policeman assisted some of his fellow-citizens in resisting arrest by a German detective in Brussels, and was at once seized and imprisoned by the German authorities; but not content with this, they levied a fine of half a million marks on Brussels itself, though there was not only no evidence of any complicity on the part of a single other person, but the circumstances of the offence made it practically impossible that there could have been any.[3] Nor were fines

[1] For the text of the Hague Regulations referred to in the last four sections, see Higgins, *The Hague Peace Conferences*, pp. 244–253; Whittuck, *International Documents*, pp. 139–142; Scott, *The Hague Peace Conferences*, vol. II, pp. 394–401; *Supplement to the American Journal of International Law*, vol. II, pp. 112–117.

[2] [Cf. Garner, *International Law and the World War*, vol. II, §§ 409–410. The view in vol. I, p. 455, is too sweeping.]

[3] [Garner, *Ibid.*, vol. II, §§ 405, 411. Fauchille, *Droit International Public*, vol. II, § 1219.]

illegally imposed the only mode in which the Germans disregarded the Article. Their burning of the University of Louvain in September 1914 was a piece of barbarism which has no real defence. They excused it officially on the ground that the inhabitants had fired on their soldiers. The report of the Committee on alleged German atrocities states that any "impartial tribunal" would have found that the Germans themselves had fired on each other.[1] Unhappily the tribunals set up by an occupier for trying offences by the inhabitants are not likely to be strictly impartial, but the Germans seem to have made no previous inquiry whatever,[2] and their infliction of any collective punishment was therefore unlawful. But even if inquiry had shown that the population was collectively responsible, the destruction of the university would have been out of all proportion to the offence. There is far too much reason to believe that it was not a method of redress at all, but an act of vengeance on the civil population because the German troops had been repulsed by the Belgian army beyond Louvain.][3]

[1] [P. 29.]

[2] [Orchelle, *Who are the Huns?* (1915) pp. 249–250.]

[3] [See note 1, *supra*. Garner, *op. cit.*, vol. I, §§ 282–284.]

# CHAPTER V

## THE LAWS OF WAR WITH REGARD TO ENEMY PROPERTY AT SEA

### § 181

The national character of vessels.

Both the public vessels of a state and the private vessels of its citizens are deemed to carry with them its national character. Public ships are generally equipped and armed for war; but every maritime state maintains peaceful services afloat as well as ashore, and the vessels belonging to them are as truly public in character as are the flag-ships of its admirals. Indeed all vessels controlled entirely by the state, commanded by its officers, and employed in its service, are public ships, even though the state does not own them, but has chartered them for temporary use. The distinction we constantly draw between the legal position of warships and merchantmen ought in strict accuracy to be drawn between public and private vessels.

The character of a public vessel is proved by her commission. In most cases the flag she flies, her outward appearance, or the word of her commander, is sufficient evidence.[1] But it is necessary to remember that in time of war the fighting ships of the belligerents are free to disguise themselves in any way they please, and to fly a false flag as long as they run up the true one before they fire the first hostile gun. We must also bear in mind that there are differences of opinion among states as to the legality of merchantmen converted at sea into armed cruisers, and as to the exact conditions under which the ships of a volunteer navy are lawful combatants.[2] With regard to private vessels, their nationality, as we have already seen, is shown by the flag they are entitled to fly.[3] A false flag may be hoisted; but the right of search is a protection to belligerents against such an obvious device. The true flag is determined by

[1] Perels, *Seerecht*, § 11.

[2] See §§ 201, 202.

[3] See § 151.

the ship's certificate of registry.[1] No doubt it is sometimes possible to obtain by false declarations papers which, though perfectly regular and given in good faith, secure for a ship registration under the flag of one country while it really belongs to the mercantile marine of another. In the case of the *Virginius* the United States went so far as to maintain that a certificate of registry was conclusive as between a merchantman searched by a cruiser and the searching vessel. It would be difficult to defend this doctrine in its original breadth; but there can be no doubt that a ship's papers, if genuine, are conclusive as to its national character.[2] Yet even when it is quite clear that a vessel belongs to a neutral owner, it will be treated as enemy property if it is chartered by the enemy, or uses habitually his flag and pass, or sails under a license given by his government.[3] Indeed a maritime belligerent would capture and condemn its own private vessels if found in any of these predicaments. [Article 57 of the Declaration of London, 1909, with certain exceptions made the neutral or enemy character of a ship depend on the flag which she was entitled to fly. Though the Declaration was unratified, this Article of it was at first adopted by Great Britain and France during the great war. But they were compelled to abandon it, owing to the German practice of disguising their ownership of neutral ships which they had bought by sailing them under neutral flags. Thus, a ship owned by a company incorporated in Holland and flying the neutral Dutch flag was condemned by the British Prize Court, because the company was entirely under the control of Germans resident in Germany.] [4]

§ 182

As a general rule

*Public and private vessels of the enemy*

may be attacked and captured in their own ports and waters, in the ports and waters of the attacking power, and on the

[1] See § 187.

[2] Moore, *International Law Digest*, vol. II, pp. 898, 899, 981–983; Hall, *International Law* (7th ed.), § 86.

[3] Holland, *Manual of Naval Prize Law*, p. 6.

[4] [*The Proton*, L. R. [1918] A. C. 578.]

high seas, but not in neutral or neutralized ports and waters. But to this rule there are several exceptions, some of them based on general agreement and embodied in law-making treaties, while others arise out of the almost unbroken usage of maritime warfare in recent times. We will take them one by one, and describe their nature and extent.

The extent to which vessels of the enemy are liable to belligerent capture.

First among the exceptions to the rule of capture come *hospital ships*. [The rules relating to these have been already stated.] [1]

Next come *vessels employed on religious, scientific, or philanthropic missions*. Their exemption from capture was originally established by a usage extending back to the middle of the eighteenth century, but it now rests on a specific agreement contained in the fourth article of the eleventh Hague Convention of 1907. A corresponding obligation to refrain from taking any part in hostilities is laid on the protected vessel. Obviously this is of the essence of the arrangement, and, therefore, though it is not expressly mentioned in the Convention, it must be understood as still subsisting. This cannot be said of the other customary duty of obtaining a pass from the enemy's government. It can hardly be regarded as essential, but is rather of the nature of an extraneous safeguard. And the silence of the Convention with regard to it was meant to be taken as signifying that it is no longer obligatory.[2] The point is important; for the case of Commander Flinders shows what unpleasant possibilities lurk in ambiguity. He was engaged in Australian exploration during the early years of the nineteenth century, in the midst of the long war with Revolutionary and Napoleonic France. Before he sailed from England he had obtained a passport from the French Minister of Marine, and during his voyage he had scrupulously obeyed his instructions to "act in all respects towards French ships as if the two countries were not at war." Yet when in 1803 he put into Port Louis in Mauritius, then a French colony, his ship was detained, and he and his crew were made prisoners of war. It seems that at Sydney his

[1] See § 165.

[2] *Actes et Documents*, vol. III, pp. 1000–1003.

original vessel, the *Investigator*, had been found to be rotten and unseaworthy, and he had exchanged her for the *Cumberland*, which was placed at his disposal by the Governor of New South Wales. The French authorities at Mauritius detained the vessel and all within her, on the ground that she was not the ship to which a passport had been given, and that there were suspicious circumstances connected with her entry into Port Louis. Flinders remained in captivity till he was released on parole in 1810, and the *Cumberland* was retaken when Mauritius capitulated to the British in the same year. The case shows the need of extreme care in carrying into effect arrangements between belligerent powers.[1] [The question has arisen whether an enemy merchant ship requisitioned by its government for the removal of refugees from an enemy port, the investment of which is imminent, can be described as engaged in a "philanthropic mission." This was the case of the *Paklat*, a German vessel captured by the British on a voyage from Tsingtau to Tientsin with women and children on board, after the outbreak of war in 1914, and shortly before the blockade of the former port. The Prize Court at Hong-Kong condemned the ship on the ground that she was an ordinary merchant vessel and being engaged in service in connection with the war, she could not claim exemption under the eleventh Hague Convention of 1907, in which there is nothing to imply that a "philanthropic mission" includes the removal of non-combatants from a place besieged or about to be besieged; and that any such interpretation would have brought the Hague Convention in direct conflict with the right of a belligerent to prevent the egress of non-combatants from such a place.[2] This decision has been questioned;[3] but on a further point there can be no doubt. The sinking at sight of a vessel engaged in a philanthropic mission—or indeed of any peaceful merchant ship—is unlawful. During the great war the Germans violated this rule in destroying by torpedo the French ship, *Amiral Ganteaume* laden with

[1] Flinders, *Voyages*, vol. II, chs. iii–ix.

[2] [1 British and Colonial Prize Cases, p. 515.]

[3] [Fauchille, *Droit International Public*, vol. II § 1395 [3].]

2500 Belgian refugees on its way to England.[1] This occurred in 1914, and was the first of a series of similar German outrages committed against neutral and belligerent ships engaged in relief work for the distressed Belgians. It was alleged by the Germans in defense that their submarine commanders in some cases made mistakes; but the recklessness with which they behaved made these mistakes inexcusable. In fact, there is too much reason to believe that the sinking was often the result of a deliberate policy of destruction, and to this infamy was added another,—most of the ships sunk carried German official safe-conducts.][2]

*Cartel-ships* form another exception. They are vessels employed in services connected with the exchange of prisoners of war. Each of them should carry a permit emanating from the supreme government of the enemy state, authorizing her to pursue her humane mission without molestation. In the case of the *Carolina* [3] Sir W. Scott decided that a subordinate authority might issue such a protection; and in the case of the *Daifjie* [4] he laid down that to enjoy the benefit of it the cartel-ship need not have prisoners actually on board. She is protected from capture on both the outward and the return voyage, and even when she has done no more than enter on her functions by being put in a state of preparation to perform them. But the mere intention to become a cartel-ship will not be sufficient; and a vessel on her way from one port to another of her own country for the purpose of taking on herself that character may be captured, unless she has obtained a pass from a commissary of prisoners, who is an official of one belligerent residing in the country of the other in order to carry out the arrangements connected with exchange. Belligerents may employ either public or private vessels in their cartel service; but the carriage of merchandise, despatches, or passengers is strictly forbidden, and also

[1] [*Revue Générale de Droit International Public*, vol. XXII (1915), Documents, p. 112 .]

[2] [Garner, *International Law and the World War*, vol. I §§ 319, 327–330. Fauchille, *Droit International Public*, vol. II, § 1588[49].]

[3] C. Robinson, *Admiralty Reports*, vol. VI, p. 336. [4] *Ibid.*, vol. III, p. 140.

the performance of any hostile acts, or even the taking on board of the means to perform them in the shape of armament. The law of the matter rests solely on usage as interpreted by prize court decisions, and [had become] of little importance owing to the disuse of exchange. But the practice may be revived at any time, and [might well have been if an agreement between Great Britain and Germany for the exchange of prisoners had been ratified before the armistice in 1918 made it inapplicable].[1]

We pass on to *fishing smacks* and *market boats*. Small craft engaged exclusively in coast fisheries or in the petty transactions of local trade were exempted from belligerent capture along with their appliances, rigging, tackle, and cargo by the third article of the eleventh Hague Convention of 1907. But "this exemption no longer applies from the moment that they take any part whatever in hostilities." And further, "the contracting powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance." The Convention safeguards and enlarges an immunity which had grown up by custom extending back to mediaeval times. In 1798 Sir W. Scott decided in the case of the *Young Jacob and Johanna* [2] that it was a rule of comity only, while a few years afterwards the French Government maintained that it was an obligatory rule of law. Whichever view may have been correct more than a century ago, there can be no doubt that the latter has now prevailed. Deep-sea fishing vessels may be captured like other ships of the enemy;[3] but inshore fishermen are allowed to pursue their avocation unmolested on condition of refraining from hostilities, and this privilege of theirs has been extended to boatmen engaged in petty local trade along the coast. If, however, the new plan of fitting trawlers with sweeps for mines is continued, in all probability the immunity will not long survive. Mean-

[1] [Garner, *International Law and the World War*, vol. II, § 360.]

[2] C. Robinson, *Admiralty Reports*, vol. I, p. 20. [Cf. *The Maria* (1915) 1 British and Colonial Prize Cases, 259].

[3] [*The Berlin*, L. R. [1914] P. 265.]

while the exact force of some of the expressions employed in the Convention may be matter of doubt. The question has been raised whether by the words of the third article the offenders forfeit nothing but their own immunity in case of a hostile act, or whether all boats of a like kind belonging to the same belligerent are thereby rendered liable to capture. The better opinion seems to be that none but boats that have themselves violated the Convention may be subjected under it to the severities of warfare. But this view does not exclude the possibility of a general attack on all fishing boats by way of reprisal, if the wrong-doing takes place on a large scale and is continued in spite of remonstrances. Moreover, it seems certain that the coast referred to in the phrase "coast fisheries" need not be the coast of the fishermen's own country, but any coast where they have a legal right to fish. On the other hand it is understood that coasting steamers are not reckoned among small boats employed in local trade, and therefore receive no protection under the Convention.[1] [Nor do craft which are an integral and indispensable adjunct of most important ocean voyages, such as lighters, tugs, and motor boats employed in coaling steamers at a port.][2]

*Enemy ships protected by licenses* are free from capture as long as they navigate and trade in accordance with the terms laid down therein. [A paragraph dealing with licenses to trade in general is added elsewhere.][3]

The sixth Hague Convention of 1907 conferred an incomplete and limited immunity on three classes of merchantmen: (*1*) *those who are found in an enemy port*[4] *at the commencement of hostilities;* (*2*) *those who enter such a port ignorant that war has broken out, and having left their last port of departure while peace still existed; and* (*3*) *those who are encountered on the high seas in the same condition of ignorance, and having sailed before*

[1] Higgins, *The Hague Peace Conferences*, pp. 403, 404.

[2] [*H. M. Procurator in Egypt* v. *Deutches Kohlen Depot Gesellschaft.* L. R. [1919] A. C. 291, 300.

[3] See § 214.

[4] [As to the meaning of "port," see *The Belgia*, L. R. [1916] 2 A. C. 183. *The Möwe* L. R. [1915] P. 1. *The Fenix, American Journal of International Law*, vol. x (1916), p. 909.]

*the war began from the last port at which they had previously touched.* With regard to all these the old right of confiscation is taken away from the enemy. Instead of it he has received a right to detain till the end of the war without compensation, or to requisition with compensation, and, in the third case, destruction is allowed as an alternative, if compensation is paid and provision made for the safety of the persons on board and the preservation of the ship's papers. But Germany and Russia entered a reservation against the treatment accorded to this last class of cases, on the ground that none but states that possessed naval stations in all parts of the world would be able to take such vessels into port. Others would be obliged to destroy them and pay compensation. They would thus be saddled with heavy pecuniary burdens which the state with a plentiful supply of ports would escape.[1] The result was that German and Russian cruisers retained the right to capture enemy merchantmen found on the high seas in a state of ignorance of the existence of war, and German and Russian merchantmen are still liable to the exercise of this right by warships of their enemies; [and examples of this occurred during the great war].[2] An attempt was made at the Conference to render obligatory the modern custom of granting days of grace, within which enemy merchantmen found in port at the opening of hostilities are allowed to depart freely provided that they are not laden with contraband, or engaged in taking to the enemy military or naval officers, or despatches relating to the war. But it was defeated owing to the desire of a group of naval powers, headed by Great Britain, to preserve liberty of action in the face of the increasing employment of merchant vessels under modern conditions of naval warfare in transport services, and the carriage of coal and stores to belligerent fleets. A strict obligation to allow the departure of enemy steamers capable of carrying large bodies of men might inflict irreparable injury on a country liable to be invaded by armies sent across the sea. Considerations of this kind prevailed; and while the Con-

[1] German White Book, Dec. 6, 1907, p. 9.

[2] [E. g., *The Marie Glaeser*. L. R. [1914] P. 218.]

ference declared it "desirable" that days of grace should be granted, it did not bind the signatories of the Convention to grant them. There is little fear that states will use their liberty to make indiscriminate seizures. Owing to the international character of modern trade and credit the blow aimed at the enemy would fall in large part on neutral commerce; and no national government desires to begin a war by offending powerful neighbors. In one case only is confiscation permitted, and that is when detained merchantmen show by their build that they are meant to be converted into war-ships.[1] A state can hardly be expected to refrain from possessing itself of its enemy's prospective cruisers when chance has placed them in its hands.

In spite of defects it seems clear that the commerce of all nations will gain an increase of security from the due observance of the rules that we have described. The United States have declined to sign the Convention on the ground that it is retrograde rather than progressive, since it treats the granting of days of grace as optional, whereas American authority seems disposed to hold that usage has made them compulsory. But it may be doubted whether this view is borne out by recent events. After the United States had given to Spain in 1898 some of the most liberal terms on record, Russia and Japan at the commencement of their war of 1904–1905 granted to each other unprecedentedly meagre advantages, the Russian period of grace being only forty-eight hours and the Japanese not more than a full week.[2] [In the ports of the United States of America, when its government entered the Great War, were about 100 German and Austrian vessels. They had used these ports for the purpose of refuge in 1914 when the United States was neutral, and had been there two and a half years. Many of them were huge liners capable of conversion into naval auxiliaries, and actually manned by naval reservists. They had frequently abused the hospitality of the United States by unneutral conduct, and if they had

[1] [Cf. *The Derfflinger* (1916), 2 British and Colonial Prize Cases, 43.]

[2] Higgins, *The Hague Peace Conferences*, pp. 301, 307; Takahashi, *International Law applied to the Russo-Japanese War*, pp. 64–69.

been allowed to depart, they would have been captured or destroyed by British or French warships, or scuttled by their own officers to avoid such seizure, or if they had survived these probabilities, would have attacked American shipping. The United States Government confiscated them by legislative action, and it is difficult to see what else could have been done. Breach of law there was none, for the United States had been no party to the sixth Hague Convention; therefore the ordinary rules of International Law applied and they could not have been severer than those of the Convention which at the very least allowed requisition of such ships, subject to compensation. The fact that no compensation was ultimately made is beside the point, being a matter of pure policy dealt with in the Treaty of Peace.

The only real question is whether the confiscation was consistent with the previous lenient practice of the United States, and the facts were so peculiar that it is doubtful whether they throw any light on this. Many of these ships, it must be noted, were probably liable to condemnation for previous breaches of neutrality or confiscable as being adaptable to warlike purposes.[1] Other points were raised in connection with this Hague Convention during the great war. In the first place, it was technically not binding on any of the belligerents owing to a clause which made it applicable only if all the belligerents were parties to it, and Serbia (to mention no other) had never ratified it. In practice, however, it was not totally rejected, and the British Prize Court decided that frequent recognition of it by the British government constituted a waiver of this clause and that compensation must be paid for the requisitioning of a German vessel, even though the vessel had been subsequently lost, and lost by German hostile action.[2] Several other decisions on the Convention occurred. The British Prize Court held that the "merchant ships" referred to in it did not include vessels which were not of a commercial character at all, such as racing yachts; and that these were therefore liable to confiscation if found in a British port at the

[1] [Garner, *International Law and the World War*, vol. 1 §§ 115–117.]

[2] [*The Blonde.* L. R. [1922] A. C. 313.]

outbreak of war. A German Prize Court held, on the other hand, that they were "merchant ships," the ground being that the phrase included all but state-owned vessels; and that such yachts could therefore be detained under the Convention.[1] Another British decision was that the Convention was never intended to apply at all to craft whose permanent home is in port and whose employment prevents them from making any prolonged departure seawards, such as lighters, tugs, and motor boats engaged in coaling steamers.[2] As to the allowance of time for vessels to depart, practice varied during the Great War. Where reciprocity of treatment was not assured, no egress at all was permitted. And the number of days of grace differed where agreements were reached, e.g., France fixed it at seven, the British proposal was ten.[3] In any event, according to the British view, the grant of leave to depart is not a rule of International Law, apart from the Hague Convention (which at most merely makes it "desirable"); and if there be no reciprocal agreement for it, the ships in port are confiscable.[4]

No immunity from capture has been given by International Law to public vessels driven into an enemy's port by stress of weather. There are a few instances on record where a chivalrous enemy has refused to take advantage of distress or mishap, but there are more where seizure has been effected.[5] Nor does there seem any good reason of justice or humanity why the agents of a state should deprive their country of an advantage that fortune has thrown in her way. When an enemy vessel was released in such circumstances as we have described, it was done as a matter of grace and favor, not because there was any obligation to do it. The same may be said of mail-

[1] [*The Germania.* L. R. [1917] A. C. 375. *The Primavera* (1917) *Journal du Droit International,* vol. XLIV, p. 1804.]

[2] [*H. M. Procurator in Egypt,* v. *Deutches Kohlen Depot Gesellschaft.* L. R. [1919] A. C. 291, 301.]

[3] [Garner, *International Law and the World War,* vol. I §§ 104–106.]

[4] [*The Marie Leonhardt.* L. R. [1921] P. 1. [See generally Pearce Higgins in *British Year Book of International Law* (1922–1923), pp. 55–78.]

[5] Halleck, *International Law* (Baker's 4th ed.), vol. II pp. 125, 126.

boats, though, as we shall see in the next section, mail-bags are now protected by a definite rule of law. Here and there we may find a treaty between two states for the exemption from capture in time of war of the vessels employed in the conveyance of their overseas correspondence; but such agreements are not common. Great Britain has four only, Holland, the United States, Belgium, and France, being the other parties.

Each of these Conventions stipulates that the arrangement may be brought to an end by either side on giving notice to the other, and it is very doubtful whether any of them would stand the strain of a war. In fact, the movement in favor of exempting social and commercial correspondence from the severities of warfare has taken the direction of a demand for the protection of the communications themselves rather than the vehicles which carry them. Occasionally neutrals have attempted to obtain from their mail steamers freedom from belligerent search; but in no case has absolute immunity been conceded. Conditions more or less onerous in character have always been insisted on. President McKinley in his Proclamation of April 26, 1898, at the beginning of the war between the United States and Spain, declared with regard to neutral mail-boats that their voyages were not to be interfered with "except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade"; and in 1900, during the Boer War, Lord Salisbury made a somewhat similar declaration to Germany. These represent the high-water mark of concession, and it will be seen how far they fall short of complete immunity.[1] [None was allowed during the great war.] The Hague Convention, which grants it to mails, merely provides with regard to mail-boats that they are not to be searched "except when absolutely necessary."[2] The restoration of the personal effects of the captain and crew of a captured vessel is sometimes regarded as an example of exemption. But it depends entirely on the good-will of the captors or on that of the prize court, and it can no more be claimed as a

[1] Lawrence, *War and Neutrality in the Far East*, 2d. ed., pp. 185–200.
[2] *Eleventh Convention*, Article 2.

right than the other so-called immunities considered in this paragraph.[1]

§ 183

We will now pass on to the consideration of

*Sea-borne goods of the enemy.*

The [unratified] Declaration of London of 1909 lays down that the national character of goods found on board a captured vessel is determined by the national character of their owner. If the vessel that carries them is enemy, they are presumed to be enemy in the absence of proof of neutral character. The enemy character clings to them until they reach their destination, notwithstanding any transfer to a neutral owner effected after the outbreak of hostilities and while the vessel is on her voyage. To this rule there is, however, one exception. If, before the capture is made, the enemy owner becomes bankrupt, and a former neutral owner exercises a recognized legal right to recover the goods, they regain their neutral character.[2]

Enemy goods found on board enemy ships are undoubtedly liable to capture, though there are a few exceptions which will be described almost immediately. Enemy goods found on board neutral ships must now be regarded as free from capture. The complications caused by questions of blockade, contraband, and unneutral service will be considered under the Law of Neutrality, where they properly belong. In all ordinary cases the rule is that the flag covers the cargo, or, in other words, that enemy merchandise is safe when laden on board a neutral vessel. The old rule of the *Consolato del Mare* gave the captors a right to seize it, though the ship which carried it was released and received payment for its services.[3] But the movement which began in the seventeenth century in favor of the principle summed up in the maxim "free ships, free goods" gained a decisive victory in 1856, at

[1] Westlake, *International Law*, part II, p. 154.

[2] *Declaration of London*, Articles 57–60.

[3] Pardessus, *Us et Coutumes de la Mer*, vol. II, p. 292.

the close of the Crimean War. Its object was practically attained when Great Britain, which had hitherto supported the older rule, agreed to substitute the new one for it, and signed the Declaration of Paris, the second article of which set forth that "the neutral flag covers enemy's goods with the exception of contraband of war." [Down to 1914] the vast majority of civilized states had given their formal adhesion to the Declaration, and those who had not had nevertheless observed its rules as belligerents, and accepted the benefit of them from belligerents when neutral. The uninterrupted practice of nearly sixty years, the express assent of nearly every civilized state, and the almost unanimous support of jurists [seemed to make] the articles, including the second, as binding as anything in International Law which does not rest on the plainest dictates of humanity; [but they were seriously shaken during the great war, the effect of which is discussed later].[1] We come, therefore, to this, that in cases of ordinary trade a belligerent may seize the goods of enemies at sea only when they are navigating in enemy vessels.

But there are exceptions even here; and the first of them is *the postal correspondence of the enemy*. It was rendered inviolable by the eleventh of the Hague Conventions of 1907, whether it was official or private, whether found on board a neutral or an enemy ship. But the immunity was not extended to vessels that might happen to carry letters, nor even to regular mail steamers, though it was agreed that these latter were not to be searched "except when absolutely necessary, and then only with as much consideration and expedition as possible." If the vessel were detained, the correspondence was to be forwarded by the captor as soon as possible. The only case in which the old right of search, and, if need be, of capture was retained was that of communications proceeding by sea to and from a blockaded port. Russia, China, and Montenegro refrained from signing this Convention, but all the other powers accepted it. Belligerents are now able to send their warlike messages by submarine cables or wireless telegraphy, and naturally they prefer these quick and compara-

[1] [See § 243.]

tively safe methods to the slower and more dangerous course of forwarding despatches by ocean-going vessels. While this change was taking place on the one hand, on the other, sea-borne correspondence was increasing every day, owing to the growth of international commerce, and the extension of travel and social intercourse. Finally it became evident that the small possible gain to belligerents by interfering with the convenience of the civilized world was far outweighed by the trouble and loss that the interference caused. When this was borne in upon rulers they were willing to grant immunity from belligerent capture at sea to mail-bags and letters. [The problems arising in the great war make it regrettable that the convention was not drafted with more detail as to the matter with which it did deal, and that a rather short view was taken of the topic itself. Does it exclude from capture correspondence only when it is on the high seas, or also when it is in territorial waters? Is the exemption absolute or is the correspondence liable to scrutiny in order to detect the presence of contraband, or other things useful to the enemy? Does it include parcels as well as letters? Apparently not, for the conference certainly intended to exclude them.[1] Again, were letters exempted if they contained negotiable securities like cheques?[2] And did the Convention apply when a belligerent used it wholesale to the detriment of its enemy by sending through the post propaganda, and incitements to commit acts of incendiarism, sabotage and insurrection? Great Britain and France countered these German practices by stopping and searching mails, and they certainly found what they sought. The chief protest came from the United States of America, and was mainly directed to the irritating delays caused by these searches, for they necessarily involved taking the vessels into port if the examination of hundreds of mail-bags were to be adequate at all. There can be little doubt that the British and French action was morally justified, for the convention had proceeded on the assumption that postal correspondence

[1] [*Actes et documents*, vol, III, pp. 1121–1122.]

[2] [*The Noordam* (*No. 2*). L. R. [1920] A. C. 904. Held: bearer bonds were confiscable. Fauchille, *Droit International Public*, vol. II. §1395[6].]

had become of so little importance compared to other modes of communication that its inviolability would not seriously injure a belligerent, and the evil results of its abuse were apparently not foreseen.[1] It should be added that the convention was not binding owing to the common emasculatory clause that it is only applicable where all the belligerents are parties to it, but that the strength of the British and French case need not be based solely on this legal technicality.]

In all probability *books and works of art in course of conveyance to some public institution in the enemy's territory* would now be regarded as exempt by usage from confiscation. In the case of the *Marquis de Somarveles* [2] the British Vice-Admiralty Court of Halifax in Nova Scotia restored in 1812 to the Academy of Arts in Philadelphia a cargo of paintings and prints captured on their voyage from Italy to the United States. This decision has often been mentioned with approval, and seems to have been followed during the American Civil War.[3] Article 56 of the Hague Code for Land Warfare exempts from seizure by troops the property of institutions dedicated to art and science; and there can be little doubt that a prize court of to-day would extend the exemption by analogy to property found at sea, especially as there are the precedents we have mentioned ready to be quoted in support of such a decision.

*Enemy cargo on board the three classes of enemy merchantmen protected from confiscation at the beginning of a war by the sixth of the Hague Conventions of 1907* was accorded a similar protection by the same Convention. But it may be detained without compensation if it is restored at the end of the war, or it may be requisitioned with or without the ship on payment of compensation. The reservation made by Germany and Russia with regard to certain vessels applied to their cargoes also.[4]

The Hague Convention of 1907 on Red Cross work at sea allows a belligerent who captures a warship of his enemy to

[1] [*Actes et documents*, vol. III, pp. 1121–1122. Garner, *International Law and the World War* vol. II §§ 532–537.]

[2] Stewart, *Vice-Admiralty Reports*, p. 482.

[3] Westlake, *International Law*, part II, p. 161.

[4] See § 182.

appropriate the *hospital appliances and stores* in use in her sick bay, but imposes on him the obligation of applying them to their original purpose as long as necessary or substituting for them other adequate provisions.[1]

§ 184

When a ship is seized by a belligerent, International Law allows her master to come to an agreement with the captors for ransom. If the bargain is effected, they receive from him one of his crew as a hostage and a document called a ransom bill, which covenants for the payment to them of a certain sum within a given time. In return the ship is set at liberty along with her crew, and the master is allowed to take her to a port of his own country by a prescribed course and within a fixed period. During this voyage she is protected by a copy of the ransom bill, which is retained by the master and has the effect of a safe-conduct. But the protection vanishes if the vessel deviates from the prescribed course or exceeds the stipulated time without urgent necessity. She is then liable to capture by any ship of the enemy or his allies, and should she be taken a second time the first captor obtains the ransom money from the proceeds of her sale after condemnation, while the second has to be content with the balance. The capture of her captors by a cruiser of her own state or its allies has the effect of nullifying the contract of ransom, provided that the ransom bill and the hostage who is usually taken as collateral security are on board at the time. The courts of most states look upon ransom bills as contracts of necessity and allow the captor, though an enemy, to sue directly for the sum agreed upon, if the owners of the ship and cargo decline to pay it.

The practice of ransom.

Great Britain has prohibited the practice of ransom for more than a century. It savors of tenderness to private interests at the expense of the interest of the state. It tends to check the destruction of the enemy's mercantile marine and the consequent diminution of his resources for war, while

[1] *Convention for the Adaptation of the Principles of the Geneva Convention to Maritime War*, Article 7.

at the same time it makes merchantmen less anxious to escape capture and therefore less keen and self-reliant in their efforts after safety. It helps to foster the idea that the end of war is the enrichment of individuals by prize money rather than the redress of national grievances. British law gives power to the Crown to make by Order in Council what regulations it pleases with regard to English merchantmen captured by an enemy; but no permission to ransom them has been granted. The British example has been followed by the Baltic powers; but France and the United States put no obstacle in the way of their officers and citizens who may wish to enter into contracts of ransom.[1]

## § 185

Recapture at sea and the *jus postliminii*.

When property captured by the enemy is recaptured at sea or in harbor, it is generally restored to the original owners by what is called, on the analogy of those rules of Roman Law which gave back to persons and things their original position on their rescue from the power of the enemy, *jus postliminii*, or postliminy.[2] During the formative period of modern International Law there was some doubt as to the application of this principle. The *Consolato del Mare* is the only mediaeval maritime code that mentions restoration after recapture, and its references to the subject are obscurely worded.[3] Grotius hardly ventures to decide whether ships can claim the benefit of postliminy.[4] The first clear and undoubted instance of its extension to them as a matter of state policy occurred in 1584, when the French Government directed that vessels recaptured within twenty-four hours of their capture by the enemy should be restored to their original owners.[5] The British in 1649 adopted a rule practically identical with their present usage, and the Dutch in 1666 ordered restitution if the re-

[1] Hall, *International Law*, 7th ed., p. 489, note; Moore, *International Law Digest*, vol. VII, p. 533. [Senior in *Law Quarterly Review*, vol. XXXIV, pp. 49–62].

[2] Justinian, *Digest*, 49, 15.

[3] Phillimore, *Commentaries*, part X, ch. vi, § 409.

[4] *De Jure Belli ac Pacis*, bk. III, ch. ix, 15–19.

[5] Robinson, *Collectanea Maritima*, p. 116.

capture was effected before the vessel had been sold by the captors and sent on a fresh voyage.[1] Other states soon followed this example, and the practice of restoration became general. There is, however, one exception to its generality. If the recaptured vessel is duly set forth as a ship-of-war by the enemy's authorities, while they have it under their control, it is not given back to the original owners, but becomes the prize of the recaptors. No uniform rule exists as to neutral vessels captured by one belligerent and recaptured by the other. The prize courts of the recaptors would, of course, apply their own law, but if an exorbitant salvage were given, and still more if such vessels were condemned as good prize, the government of the neutral would make its voice heard in emphatic remonstrance, and might resort to measures of retaliation. Generally an attempt is made to do substantial justice. Great Britain restores to the neutral owners without salvage if the original capture was effected under such circumstances that it may be presumed no prize court of her enemy would have decreed condemnation, but if confiscation [or destruction] was practically certain, her courts will grant a reasonable salvage.[2] Allies in a war apply to each other the law of the claimant's country at the time of the recapture, and if one of them resorts to a less liberal rule, the others treat his subjects as he treats theirs.

But in the vast majority of recaptures the recovered property is owned by subjects of the state whose cruisers have rescued it from the enemy. In such cases the conditions of restoration, and the amount to be paid to the recaptors as salvage, are determined by the law of the country to which both the original owners and the recaptors belong. States have varied considerably in their ideas about these matters, and the result is a great diversity of rules. The United States have granted restoration of the property to the original owners on payment of a salvage awarded by their courts, if the re-

[1] Bynkershoek, *Quæstiones Juris Publici*, bk. I, ch. 4.

[2] See the *War Onskan* and the *Carlotta* (C. Robinson, *Admiralty Reports*, vol. II, p. 299, and vol. V, p. 54). [*The Pontoporos*. L. R. [1916] P. 100. *The Svanfos*. L. R. [1919] P. 189].

capture is effected before condemnation of the ship in a regularly constituted prize court of the enemy.[1] France restores on payment of a thirtieth as salvage if the recapture was effected within twenty-four hours of the original seizure, but if a longer time has elapsed a salvage of one-tenth is given.[2] The English rule is the most liberal of any. It is embodied in the Naval Prize Act of 1864, but has been the same in essentials for more than two hundred and fifty years. It provides for restitution if the recapture is effected at any time during the war that witnessed the capture, and decrees a normal salvage of one-eighth, which may be increased to a fourth if the service has been one of special difficulty and danger. Several states have adopted the British usage; but there is very little uniformity in the matter, the different treatment accorded to different countries in consequence of treaty stipulations, and divergent views as to the exact moment when a good title is obtained by an enemy captor, causing numerous variations in practice. In the days when privateering flourished, those who engaged in it generally received more salvage than the regular officers and crews of the state's navy; and at the present time the law of most maritime nations grants a larger share than usual of the rescued property when it is recaptured from pirates. But if the crew of a captured ship rise upon their captors and retake the vessel, they cannot substantiate a claim to salvage; for it is held that their action is no more than a continuation of that resistance to the enemy's force which it is their duty to offer whenever there is a chance of success. If however any members of the crew or passengers are not subjects of the state whose flag the vessel carries, and do not belong to a country allied with it in the war, salvage is due to them because they were in no way bound to assist in the rescue, and consequently their aid deserves a substantial recompense. This doctrine was laid down by Lord Stowell in the case of the *Two Friends*,[3] an American vessel which had been taken by the French in the course of the hostilities between the United States and France

[1] *Revised Statutes*, § 4652. [2] Hall, *International Law*, 7th ed., § 166.
[3] C. Robinson, *Admiralty Reports*, vol. I, p. 271.

in 1799. She was recaptured by the crew with the assistance of a few British seamen who were working their passage to London in her, and the court decided in favor of their claim to remuneration. A land force may share salvage if the recaptures were due to operations carried on by it and a naval force acting together.[1] It may even obtain salvage when acting alone, in a case where the result of its military operations against an enemy's port is to cause the surrender of the place with vessels taken by the enemy from its compatriots lying in the harbor.

§ 186

The right of search.

We have discussed the rights of capture possessed by belligerents as far as it is possible to do so without introducing questions connected with neutrality. But in order that belligerents may be able to exercise these rights, it is necessary that they should possess what we may call the ancillary right to stop, detain, and overhaul merchantmen, in order to discover whether the ships themselves or the goods they carry are liable to seizure and detention. This is called indifferently the *right of search* or *the right of visit and search*. Apart from treaty, there is no right of visit without a right to examine the papers of the ship visited and rummage among its cargo if they are not satisfactory, and no right of search without a right to detain the vessel searched if a thorough examination of it reveals circumstances of grave suspicion.

All jurists agree that the right of visit and search belongs to belligerents, and to belligerents only, except in the rare cases when it is applied to suspected pirates under the common law of nations, and to suspected slave [traders, or traders in arms and ammunition within specified zones][2] under the provisions of a treaty. It is, as Judge Story said in the case of the *Marianna Flora*,[3] "allowed by the general consent of nations in time of war and limited to those occasions"; and his statement may be regarded as true, since the abandonment

[1] [Cf. *The Feldmarschall* [1920] P. 289.] [2] [See § 52.]

[3] Wheaton, *Reports of the Supreme Court*, vol. XI, p. 1; Scott, *Cases on International Law*, p. 837.

by Great Britain in 1858 of her claim to a general right of visit in time of peace in order to discover the real nationality of vessels suspected of being engaged in the slave trade. The exceptions introduced by convention[1] are themselves proof that nothing but express agreement can justify search in time of peace, unless it is directed against pirates. The right can be exercised on merchantmen only. They are bound to submit to search from a lawfully commissioned belligerent cruiser [or air vessel.][2] Resistance to it will bring down certain capture and condemnation upon a neutral ship otherwise innocent. An enemy merchantman may fight when attacked, but unless it can succeed in beating off the foe its resistance will put it in a worse position than before. A neutral merchantman violates International Law if it makes any attempt to repel belligerent search by force of arms. Success may save it for the moment, but not for long. An international question will be raised between its country and the injured belligerent; and, unless its government wishes to provoke complications, some kind of punishment will fall upon its owners for its unlawful proceeding. While, if it fails, the Sixty-third Article of the [unratified] Declaration of London of 1909 denounces against it the penalty of confiscation, which is to be shared by all property on board belonging to the master or owner. As to cargo, it is to be treated as if it were laden on an enemy vessel. That is to say, neutral goods will be released, and enemy goods condemned. [Of course, if a neutral vessel be attacked by a belligerent warship without any of the formalities of visit and search, it can lawfully defend itself.]

But though neutral ships of commerce must submit to belligerent search, neutral men-of-war are free from it. Any attempt to enforce it against them would be a gross outrage. So long ago as the beginning of the last century the British Government disavowed the act of Admiral Berkeley in ordering the vessels of his squadron to search the American ship-of-war *Chesapeake* for deserters from the royal navy. In consequence of this order a conflict took place between the *Chesapeake* and the *Leopard*, and after the surrender of the

[1] See § 103.

[2] Oppenheim, *International Law*, vol. II, § 414.

former, four seamen were taken out of her. These unjustifiable and high-handed proceedings nearly led to a war between the two countries in 1807. It was averted by the disavowal of the British Government, and its tender of indemnity to those American citizens who were injured in the action and the families of those who were slain; but unfortunately the dispute as to the right of impressment still went on, and became the chief cause of the war of 1812.[1]

A belligerent vessel may chase under false colors or without colors of any kind; but before it commences the actual work of visit and search it must hoist its country's flag. If hailing is impossible, or if the suspected vessel takes no notice of it, the chasing cruiser may signal her to bring to by using blank cartridge, and then, if necessary, sending a shot across her bows. This is called firing the *semonce* or affirming gun. Any other signal likely to be understood is equally lawful, but some unmistakable summons is necessary. Not till it has been given and disregarded is the use of force allowed. Into the incidents of a conflict we need not go. They have nothing in common with the procedure of a search. Assuming that the summons of the belligerent cruiser is obeyed, the next step taken by her commander is to send an officer or officers in uniform on board the vessel to be searched. The visiting officer should question the master of the vessel and examine her papers. If any circumstances of suspicion are revealed by his examination, but not otherwise, he is at liberty to call his boat's crew on board and order them to make a thorough search of the vessel. Should the search confirm the suspicions, the commander of the cruiser may take possession of the ship, secure her papers, and detain her master and crew. Throughout his proceedings he is bound to use courtesy and consideration, and to carry on the search with as little disturbance as possible of the interior economy or navigation of the suspected vessel. The regular course is to send her to the most accessible prize court of his own state for adjudication. For this purpose a prize crew is placed on board, with orders to take her to the port where such a court is sitting. Her master and seamen

[1] Moore, *International Law Digest*, vol. II, pp. 991–994, vol. VI, p. 1035

may be invited to assist in her navigation, but they cannot be compelled to do so. A commanding officer who cannot spare a prize crew may order an enemy merchantman to haul down her flag [1] and follow him on pain of being sunk by gun fire or torpedo; but he has no right to subject a neutral ship to such treatment. If, on trial by the prize court, the grounds on which the capture was effected turn out to be good, condemnation will ensue, and by the law of most countries the captors will receive the proceeds of the sale of the captured property in the form of prize money. If the evidence against the vessel is not conclusive, though there are circumstances of just and reasonable suspicion, she will be released, but her owners will have to bear the expense of detention and delay.[2] But if the capture was effected on frivolous and foolish grounds, the parties interested have a right to compensation.[3] And the same rule holds good in the more difficult matter of the treatment of vessels suspected of piracy by the cruisers of non-belligerent powers. Being at peace, they have no right to search unless the ship they have in view is really a pirate, in which case their right is a right to capture. But they may be unable to tell whether the right to seize the vessel exists until they have visited and overhauled her. They must, therefore, be guided by circumstances. Should the information they have received, and the behavior of the vessel when approached, give rise to reasonable suspicion that she is a pirate, their commanders are not liable to damages for seizing her, even if it should turn out that her errand was perfectly lawful. But if they have made an inexcusable mistake, they must suffer for it. On the other hand, should the vessel be really a pirate, their action is lawful from the beginning and they have performed a meritorious service.[4]

The object of the procedure we have just sketched is to secure belligerents against evasion of their right of capture, and at the same time protect neutrals from vexatious inter-

[1] [See *The Pellworm*. L. R. [1922] A. C. 292.]

[2] [*The Baron Stjeinblad*. L. R. [1918] A. C. 173. *The Sigurd*. L. R. [1917] P. 250.]

[3] *Declaration of London of 1909*, Article 64. [Cf. *The Bernisse*. L. R. [1921] 1 A. C. 458.]

[4] See the case of the *Marianna Flora*, cited at the beginning of the section,

ference with their sea-borne commerce. The further limitations which some writers [1] have striven to impose on the action of searching officers have not been accepted by the great body of maritime states, and find no place in modern International Law. But it is different with restrictions on the right itself as distinct from the mode of its enforcement. Even when neutral vessels had not rendered themselves liable to detention and condemnation, they suffered so much annoyance and loss from belligerent search that their governments naturally endeavored to minimize the opportunities of subjecting them to it. Hence arose a persistent attempt to secure freedom from visit and search for neutral ships of commerce sailing under the escort of ships of war of their own nationality. We shall consider the matter under the head of Convoy [2] when we deal with the Law of Neutrality. But the changed conditions of commerce have made further advances necessary. While the amount of mercantile tonnage at sea is increasing enormously with the growth in international trade, the number of ocean-going merchantmen afloat is actually decreasing. Huge cargo-boats are built, which carry thousands of tons of merchandise belonging to shippers of many nationalities. Craft such as these cannot be searched at sea in a few hours, as was the case with the much smaller vessels of fifty years ago. The belligerent must exercise his right to take them into one of his own ports, and there employ gangs of men to empty their spacious holds. This means long delay, and delay means ruinous loss to shippers. Even if nothing of a compromising character is found, and in the end the ship and cargo are released, a large fine will have been inflicted on innocent people. The Boer War afforded some cases in point. On December 29, 1899, the German mail steamer, *Bundesrath*, was brought into the port of Durban by a British cruiser on suspicion of carrying contraband of war and volunteers for the Boer army. She was searched for nine days, and then released on the ground that no contraband had been found. The *Herzog* went through a somewhat similar experience, but was released after detention

[1] E.g., *Hautefeuille, Droits des Nations Neutres*, tit. ix, ch. i. [2] See § 244.

in port for three days. The *General* remained six days at Aden, during which time twelve hundred tons of cargo were first removed and then replaced. All these vessels were bound for Lorenzo Marques, a neutral Portuguese port in Delagoa Bay, whence the Transvaal Government drew warlike supplies over the railway connecting it with their capital, Pretoria. The controversy which immediately arose between Great Britain and Germany was, therefore, complicated by references to the question of the soundness of the doctrine of continuous voyages, which we shall discuss in Chapter VI of Part IV. We are concerned now with the vast extension in modern times of the inconveniences and losses caused to neutrals by belligerent search. Great Britain did not exceed her strict legal right by one iota. The question whether the suspicions that caused her to detain the German steamers were correct was never threshed out in a prize court. But the mere preliminaries of a trial roused a storm of indignation in Germany, and seriously embittered the relations between the two countries. The release of the vessels was effected by administrative order, and the British Government paid an indemnity of £20,000 for the injurious exercise of an undoubted right.[1] It is clear from the bare recital of these facts that in any naval struggle carried on by powerful maritime states the position of neutrals possessed of a great mercantile marine [is likely to] be intolerable. The only way of escape is to modify the right of search to such an extent that belligerents may obtain reasonable assurance of the innocence of harmless cargoes, without inflicting on neutrals the ruinous and humiliating process of deviation to a belligerent port and a complete overhaul therein of all the vessel contains. The continuance of the existing state of things involves grave danger of a great extension of any naval war that may break out in the near future. It is worthy of consideration whether some system of official certificates could not be devised, whereby neutral vessels could carry, if they chose, satisfactory assurances that their passengers and cargoes consisted only of the persons

[1] For the facts and correspondence see British Parliamentary Papers, *Africa*, No. 1 (1900).

and goods set forth and described in their papers. A visiting belligerent officer could then decide whether to effect a capture or not, without the need of a preliminary search. [Occurrences during the great war add weight to the author's views. Constant complaint was made by the United States of America (then neutral) of the British practice of taking American ships into port for search instead of examining them on the high seas. The British pleaded in justification the impossibility of making any thorough search at sea owing to the size of the ships, the bulk of their cargoes and the skill with which they were often disguised, the risk of submarine attacks, and the impracticability of boarding a ship for days together under North Atlantic winter conditions. The system of giving certificates by the United States customs officials or by British consuls was unsatisfactory because it afforded no guarantee against adding contraband goods to the cargo after the ship had left port. Another device adopted in 1916 was more successful. This was the grant of "letters of assurance" by the British embassy at Washington to exporters of cargoes which had been inspected and found unobjectionable.][1]

## § 187

Ships' papers.

We have had occasion in the preceding pages to mention ships' papers on several occasions; but we have not yet explained what they are, and it will be convenient to do so now. International Law requires every merchant vessel to carry certain documents as evidence of her nationality, the course of her voyage, and the nature and destination of her cargo. She should also have on board written evidence of the ownership of both vessel and cargo, a muster roll of her crew, and full evidence as to any contract concerning the letting and hiring of the vessel and the delivery of the goods on board. The law of each maritime country fixes for its merchantmen the exact form and number of these papers; but they must always indicate the ownership of cargo and vessel, and specify her nationality and destination.

[1] [Hall, *International Law*, 7th ed., § 273. Oppenheim, *International Law*, vol. II, § 421 *a*. Garner, *International Law and the World War*, § 500.]

Great Britain requires a certificate of registry, which describes the ship minutely and gives the names of her owner and her master. In addition a British vessel should have a muster roll of her crew, shipping articles, an official log-book, a ship's log-book, a manifest of cargo, the bills of lading, and the charter party if the vessel is hired. The list of the United States is almost the same, except for the addition of a bill of health and the omission of bills of lading. The law of Germany demands a certificate of registry, a certificate of nationality, and a certificate of measurement, the three documents giving between them about the same information as is given by the British and American certificates of registry. Further, a German vessel should carry a muster roll, a log-book, a manifest of cargo, the bills of lading, and the charter party if necessary. The French law prescribes a certificate of nationality, a sailing license, a muster roll, an inventory of the ship's fittings and stores, a log-book, a manifest of cargo, the bills of lading, and a charter party if needed. These four lists may be taken as typical, and it is obvious that they all provide for the setting forth of the same essential facts, though under slightly different heads. The information is what International Law demands. It leaves the forms and modes of giving it to be settled by each maritime state for its own vessels.

The absence of the proper papers, or gross irregularities, omissions, or inconsistencies in them, will justify detention by a belligerent cruiser, as will also the presence of false papers. What is technically called spoliation of papers signifies the wilful destruction of documents by throwing them overboard during a chase, or by any other means. The British and American practice is to regard it as good ground for the capture of the vessel, but not necessarily good ground for condemnation. It affords a strong presumption of her guilt, but not a presumption which cannot be rebutted by evidence to the contrary. This view seems now to be general among maritime states.[1]

[1] Halleck, *International Law*, Baker's 4th ed., vol. II, p. 301; *General Report Presented to the Naval Conference of London*, ch. ix, for which see British Parliamentary Papers, *Miscellaneous*, No. 4 (1909), p. 65.

§ 188

The nature of prize courts and the responsibility of the state for their decisions.

As between belligerents superior force is its own justification. If enemy property is captured at sea under circumstances that render it liable to hostile seizure and detention by the laws of war, the rights of the original owners are destroyed, though, as we have recently seen, they may be revived by the *jus postliminii* in cases of recapture. But sometimes it is doubtful whether certain property really belongs to an enemy owner, or whether the capture was effected in a place where warlike operations may be carried on; and it is always necessary to determine the exact extent of the proprietary rights accruing to the individual captors. It follows, therefore, that the intervention of a court is highly desirable, even in the cases where belligerent property, or what is believed to be such, is the only subject-matter concerned. But desirability becomes necessity when neutral rights and neutral claims are involved. Force cannot control the relations of states at war with the subjects of powers that take no part in the contest. They may be condemned to lose their property under certain circumstances, but the mere fact that a belligerent has succeeded in obtaining and keeping possession of it does not give him a right to it. The question whether he has such a right or not is a question of law to be settled by judicial proceedings. Accordingly, all civilized belligerents establish prize courts for the protection of neutral subjects and the proper adjustment of the claims of captors. When the servants of a state seize enemy property at sea, in strictness of law they seize it for their country, and not for themselves. Yet the law of nearly every nation gives the whole or a portion of it to the captors according to some scale of reward fixed by public authority. The United States was the pioneer of reform, Congress having abolished prize-money in 1899.[1] In 1864 the British Parliament legislated on the subject in the Naval Prize Act, which expressly declares that captors "shall continue to take only the interest (if any) in the proceeds of prizes as may be from time to time granted to them by the Crown." But it is and has

[1] Moore, *International Law Digest*, vol. VII, p. 543.

been the invariable rule of the Crown in modern times to surrender the entire proceeds to the officers and men engaged in the capture. The general practice of prize courts is to order a sale of the vessel or goods on condemnation; and the sum thus realized is divided among the captors.

Prize courts are municipal tribunals set up by belligerent states in their own territory, in territory under their military occupation, or in territory belonging to an ally in the war.[1] In the last case the permission of the ally must be obtained beforehand. But a neutral cannot allow the establishment of a belligerent prize court in its territory without a grave breach of the duties prescribed by neutrality; and if one of the parties to the war attempts to set up such courts within the area of neutral jurisdiction, he commits a gross outrage upon the neutral's independence by his endeavor to exercise powers of sovereignty of the highest kind in the dominions of a friendly and peaceful nation. Should such an aggression take place, the state that suffers from it may resent it by war, if diplomatic pressure fails to obtain redress. Submission on the part of the neutral government would bring upon it reclamations and possibly hostilities from the belligerent that suffered through its subservience. This was clearly seen by Washington when in 1793, Genêt, the Minister of the French republic, endeavored to set up consular prize courts within the territory of the United States. After a period of unavailing remonstrances addressed to him personally, his recall was demanded from his government, which complied with the request, and caused the discontinuance of the obnoxious proceedings.[2]

Though prize courts are set up by the authority of a belligerent government, and their judges are appointed and paid by it, they exist for the purpose of administering International Law. In America, court after court has decided that International Law is part and parcel of the law of the land;[3] and it is

[1] Halleck, *International Law*, Baker's 4th ed., vol. II, pp. 431–433; see also *Oddy* v. *Bovill* (Scott, *Cases on International Law*, pp. 924–925).

[2] Moore, *International Law Digest*, vol. IV, pp. 486, 487; Washington's Special Message, Dec. 5, 1793.

[3] Wharton, *International Law of the United States*, § 8.

held that every member of the family of nations must submit to the rules of the society of which it forms a part. On the continent of Europe it would [hardly] meet with general acceptance. [Yet the better view at the present day is that a prize court is not an international court, and that its decisions are not International Law, though they may well be founded on it, and usually are. All that has been said to the contrary is reducible either to looseness of expression,[1] or to a confusion of thought which assumes that because a state rarely interferes with its prize courts they are therefore above municipal law. This is not so. They are created by their own state alone, and to that state alone are they responsible. And though International Law may be the *source* of their decisions, yet the decisions themselves are part of municipal law, and are not as such International Law but only evidence of it; unless indeed they lay down a new rule in which case they may become the *source* of a new rule of International Law if other states adopt it, but until such adoption the rule remains one of municipal law.

Proof of the correctness of this view is to be found in the judicial decisions on both sides of the Atlantic. In *The Amy Warwick* (1862), a decision of the Supreme Court of the United States, it was laid down that "prize courts are subject to the instructions of their own sovereign."[2] And in the British case of *The Zamora* (1916), the dictum of the Judicial Committee of the Privy Council that "the law which the Prize Court is to administer is not the national or, as it is sometimes called, the municipal law, but the law of nations"[3] was so qualified as to make it clear that while International Law may be the basis of a prize court decision, yet the decision is not as such anything more than municipal law. For it was admitted that the court is bound by the legislative enactments of its own state [4] which may possibly prescribe something quite inconsistent with International Law. All that the case actually decided was that the Crown (which of course is not the supreme legislature) has no

[1] [E.g., *The Kronprinzessin Victoria.* L. R. [1919] A. C. at p. 218.]
[2] [2 Sprague, 123. Scott, *Hague Peace Conferences*, vol. I, p. 471.]
[3] [L. R. [1916] 2 A. C. at p. 91.]
[4] [*Ibid.*, p. 93.]

power by Order in Council to alter the law which prize courts have to administer, except when the Order mitigates the Crown's rights in favor of enemies or neutrals.] All nations would, however, agree in holding that their prize courts were bound to apply the rules of the law of nations to the cases that came before them for settlement; and in the vast majority of cases practice on this point coincides with theory. Yet the most upright of judges may be compelled to give a decision he knows to be contrary to the received principles and rules of the international code when the sovereign authority of his own state issues laws and regulations commanding conduct that International Law forbids, or forbidding conduct that International Law commands. But the state itself is responsible to other states for any injury done to them or their subjects by proceedings in excess of its lawful powers as a belligerent. Its prize courts, if left to themselves, as they ought to be and generally are, will, as a rule to which there are some notorious exceptions, administer International Law; but if legislation contrary to International Law is thrust upon them, they must obey it. Other states, however, are in no way bound to submit; and if neutrals think themselves aggrieved because of decisions arrived at, either spontaneously or in consequence of legislative acts, they will complain to the belligerent government.

The effect of a decision made in a prize court is to settle all proprietary rights in the vessel or goods under adjudication. Controversy between the captors and the claimants is terminated by the final judgment on appeal, and a court of another country cannot afterwards review the decision. But compensation for damage suffered in consequence of it may be demanded on behalf of neutral sufferers by their own government.[1] A state is responsible for the decisions of its prize courts; and if they have acted unjustly, it is its duty to give satisfaction. Many instances where this has been done may be found in the history of international relations. We may give, as an example, the award of the Mixed Commission, appointed under the Treaty of 1794 between Great Britain and

[1] Moore, *International Arbitrations*, vol. III, pp. 3184–3191.

the United States. It granted an indemnity in respect of several cases in which the British prize courts, by a stretch of the extremest rights of a belligerent, had condemned American vessels laden with provisions for French ports.[1]

§ 189

The jurisdiction of prize courts extends over all captures made in war by their country's cruisers, over all captures made on land by a naval force acting alone or in conjunction with military forces,[2] and over seizures made afloat by the joint operations of land and sea forces. It also includes all recaptures, ransoms, and ransom bills, and all incidental questions growing out of the circumstances of capture such as freights and damages. And when it was customary for states to make seizures afloat in anticipation of war, the cases that arose therefrom were taken before their prize courts. Speaking generally, we may lay down the proposition that the courts of neutrals have no jurisdiction over the captures of belligerents. But to this rule there are exceptions. Jurisdiction exists and can be exercised when the capture is made within the territorial limits of the neutral state, or when a vessel, originally equipped for war within neutral jurisdiction, or afterwards made more efficient by an augmentation of warlike force therein, takes a prize at sea and brings it within the waters of the injured neutral during the voyage in which the illegal equipment or augmentation took place. In both cases neutral sovereignty is violated by one belligerent, and in consequence the neutral is exposed to claims and remonstrances from the other. Jurisdiction is therefore conferred upon it for its own protection, and in order that it may insist upon the restoration of the property unlawfully taken.[3]

The jurisdiction of prize courts.

[1] *Treaties of the United States*, pp. 384, 385, 1322–1324; Moore, *International Law Digest*, vol. II, pp. 448, 449.

[2] [*The Feldmarschall*. L. R. [1920] P. 289. *The Anichab*. L. R. [1921] P. 218. [1922] A. C. 235.]

[3] See case of the *Santissima Trinidad* (Scott, *Cases on International Law*, pp. 701–705).

§ 190

There is little in common between an ordinary trial and a suit in a court of prize. In the former an issue between two parties is tried. In the latter the state holds what, following Dana,[1] we may call an inquest upon certain property to discover whether it has been lawfully captured or not, just as in England the coroner holds an inquest upon a body to discover whether the individual concerned came by his death lawfully or not. [Proceedings naturally vary with the municipal law of each state. In England changes were made on the outbreak of the great war in 1914, and only the barest outline of what occurs in a prize court can be given here. An affidavit as to ship papers must be sworn within ten days after the ship is brought in for adjudication, and must then be filed together with the papers in the registry. The proceedings may be instituted in the name of the claimants, except where the claim is for condemnation, in which event they must be in the name of the Crown, unless it waives its rights in favor of the captor or claimant. A writ is served on the ship, and any one who has entered an appearance to this may make a claim; but an alien enemy before appearing must file an affidavit stating the grounds of his claim. A day is fixed for the hearing, and all parties are notified of it. The evidence written (or otherwise) is taken, the burden of proof being in general on the party instituting the cause. Arguments are heard and judgment is delivered.][2]

The procedure of prize courts.

§ 191

In our account of prize proceedings we have assumed throughout that the vessel has been brought into port and delivered over to the custody of the court. Such a delivery is in accord

[1] Note 186 to Wheaton's *International Law*.

[2] [*Manual of Emergency Legislation*, 1914, pp. 256–352. *Ibid.* Supplement No. 3, pp. 507–511. Cf. Roscoe in *British Year Book of International Law* (1921–1922), pp. 90–98. J. A. Hall, *Law of Naval Warfare* (1921), ch. XI. Pyke in *Law Quarterly Review*, vol. XXXII, pp. 144–167. Wheaton, *International Law* (Dana's ed.), pp. 480–483, note; Holland, *Manual of Naval Prize Law*, ch. XXII.]

with sound principle, for the proceedings are proceedings *in rem*, and the vessel herself, with her papers and crew, is the best evidence that can be submitted to the judge. But though this course is regular, it is not essential. Property may be adjudicated upon when it lies in the port of an ally in the war, or in a foreign port under military occupation by the captor's country, or even in the port of a neutral. It is open to neutral sovereigns to admit the prizes of belligerent cruisers into their harbors. There has been a tendency in modern times to exclude them; but it is impossible to say that a breach of International Law is committed when they are allowed to enter, provided that the permission be granted impartially to both sides. And if, in consequence of such a grant, prizes lie in neutral waters, the courts of the leading maritime powers will adjudicate upon them. Sometimes a captor sells his prize before condemnation. Grave necessity will, it is said, excuse such an act; but prize proceedings for adjudication on the proceeds of the sale ought to be commenced without delay. The irregularity, however, would be so marked that we may hope it would not now be countenanced. Should the capture turn out to be illegal, neutral owners would have good ground of complaint when the proceeds of a forced sale were handed over to them instead of the ship itself.[1]

The destruction of prizes at sea.

But the most controversial cases arise when a cruiser destroys her prizes at sea, instead of taking them in for adjudication. They may be considered under two heads,—enemy vessels and neutral vessels. With regard to the former, Hall gives an excellent summary of the views expressed by various authorities, and accompanies it by many acute remarks of his own.[2] It appears to be generally conceded that when the captured ship and cargo is enemy property there is no good ground for complaining of her destruction, provided that her crippled condition rendered navigation dangerous, or the contiguity of an enemy or any other cause made it unsafe to detach a prize crew. The mere fact of firm possession transfers pro-

[1] Wheaton, *International Law*, Dana's ed., p. 486, note.

[2] *International Law*, 7th ed., § 150, and notes.

prietory rights to the captor state, and it matters little to an enemy subject who has lost them whether the captured vessel is sent to the bottom of the sea or made over by public authority to those who have wrested her from him. The doctrine that necessity justifies destruction has been laid down in British and French prize courts. In 1812 the United States went further, and instructed their naval officers at the outbreak of the war with England to destroy all the enemy merchantmen they took, unless they were "very valuable and near a friendly port."[1] The exception was here turned into the rule and the rule into the exception. It was perhaps a natural recoil from this extreme severity which caused Woolsey to characterize destruction in any case as "barbarous," and say that it "ought to disappear from the history of nations."[2] But at present there are no signs of such a disappearance. The Confederates burnt or sank their prizes during the great American Civil War, on the ground that the strict blockade of their ports by Northern squadrons rendered it impossible to take vessels in for adjudication. In 1870 the French burned two German vessels in spite of the fact that they had neutral goods on board. The Russians in 1877 destroyed some of their prizes in the Black Sea, because the Turkish blockade of their ports made access to them difficult; and in 1904–1905 they sank several enemy merchantmen in the sea of Japan without any attempt to take them to the prize court at Vladivostock. A modern warship can spare but few men from her complement for service as prize crews. It is impossible to make the duty of sending in captured enemy merchantmen for adjudication absolute and universal; but the necessity that justifies destruction should be far more strictly interpreted than has been the case on some recent occasions. [In any event, the safety of the crew, passengers, and ship papers must be provided for, and if possible, the cargo should be removed. This rule was flagrantly violated by German submarines during the great war. They systematically torpedoed enemy

[1] Quoted by Sir A. Cockburn in his *Reasons for dissenting from the Award of the Tribunal of Arbitration*. See British Parliamentary papers, *America*, No. 2 (1873), p. 93.

[2] *International Law*, § 148.

merchant ships either with inadequate notice or with none at all, and great loss of life resulted from this.[1] One of the treaties which resulted from the Washington Conference, 1921–1922, expressly dealt with this matter. It was signed February 6, 1922, by the United States, the British Empire, France, Italy, and Japan, and it provided that a merchant vessel must not be attacked unless it refuse to submit to visit and search after warning, or to proceed as directed after seizure; and that it must not be destroyed unless the crew and passengers have been first placed in safety. "Belligerent submarines are not under any circumstances exempt from the universal rules above stated," and if they cannot act in conformity with them, the "existing law of nations" requires them to desist from attack and seizure and to permit the merchant vessel to proceed unmolested. There is not the smallest doubt that the signatory powers correctly regarded the treaty as enunciating principles of International Law and not merely as setting up rules applicable as between themselves.][2]

A broad line of distinction must be drawn between the destruction of enemy property and the destruction of neutral property. The former has changed owners as soon as the capture is effected;[3] but the latter does not belong to the captors till a properly constituted court has decided that their seizure of it was good in International Law. Its owners have, therefore, a right to insist that an adjudication upon their claim shall precede any further dealings with it. If this right of theirs is disregarded, a claim for satisfaction and indemnity may be put in by their government. It is far better for a captor to release a neutral ship or goods as to which he is doubtful, than to risk personal loss and international complications by destroying innocent property. Great Britain took this view, and instructed her naval officers accordingly. The Institute of International Law in its *Règlement International des Prises Maritime* permitted the destruction of enemy ships

[1] [Oppenheim, *International Law*, vol. II, §§ 194, 194 *a*.]

[2] [*Parliamentary Papers, Miscellaneous*, No. 1 (1922). Cmd. 1627. See also § 203 *a*.]

[3] [But see Hall, *International Law*, 7th ed., p. 491 *n*.]

in certain circumstances and under certain conditions, but was silent as to neutral vessels.[1] It is true that the regulations of some states spoke in general terms of the destruction of prizes at sea without making it clear that enemy vessels only were intended.[2] It is also true that in a few cases a distinct claim was made of a right to sink or burn neutral ships which could not be sent in for adjudication. The Russo-Japanese War of 1904–1905 afforded an instance of this last pretension on the part of both belligerents.[3] In pursuance of their instructions Russian warships sank several neutral merchantmen instead of bringing them into port for trial before an appropriate tribunal. The most notorious of these cases was that of the *Knight Commander*,[4] a British vessel, for whose destruction the English Government claimed a pecuniary indemnity, which Russia refused to pay. She refused also to submit the matter to the Hague Tribunal for arbitration. In 1907 the general question was discussed at the second Hague Conference, of course without reference to particular cases. But no agreement was reached. Better fortune, however, attended the deliberations of the Naval Conference of 1908–1909. As a result of its labors divergent views were harmonized; and the fourth chapter of the Declaration of London dealt with the subject in a series of rules.[5]

They proceed on the plan of adopting as a fundamental principle the right of the neutral to a trial before a prize court, but admitting that in exceptional circumstances the rule of taking the vessel in for adjudication may be set aside. Destruction is allowed instead, if observance of the rule would involve "danger to the safety of the warship or to the success of the operations in which she is engaged at the time." The objection that general words, such as these, might, with a little ingenuity, be made to cover the great majority of captures was

[1] *Tableau Général* (1873–1892), pp. 205–207.

[2] E.g. *Naval War Code for the Use of the United States Navy*, 1900, Articles 14 and 50.

[3] *Japanese Regulations governing Captures at Sea*, 1904, Article XCI. *Russian Regulations*, 1895, § 21, and *Instructions*, 1900, § 40.

[4] Lawrence, *War and Neutrality in the Far East*, 2d ed., pp. 250–289.

[5] Higgins, *The Hague Peace Conferences*, pp. 557–559.

met by securing a legal trial in all cases. Before the prize is burnt or sunk the captor is bound to provide for the safety of all persons on board, and to secure the ship's papers and all other documents "which the parties interested consider relevant for deciding on the validity of the capture." He must send them in for adjudication in lieu of the ship; and the first question to be decided by the prize court is whether the alleged necessity really existed. The burden of proof is thrown on the captor, and if he fails, not only must he pay compensation to those who have an interest in the vessel or the goods that she carried, but he is also disabled from raising the question whether the capture itself was valid. The proceedings terminate with the decision against him on the preliminary point. But if the court is satisfied that there was good reason for destruction, it will go on to try the further question whether the seizure was effected in accordance with International Law. Should the court give judgment in the negative, then "the captor must pay compensation to the parties interested in place of the restitution to which they would have been entitled" had the vessel been still in existence, and "if neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation."[1] [The Declaration of London was not ratified, but any rational hypothesis of allowing the sinking of neutral merchant ships is subject to the proviso that the passengers, crew, and papers must first be removed in safety. When the German policy of indiscriminate destruction by submarines was inaugurated, this restriction was thrown to the winds, and in the great war some 1716 neutral vessels were sunk at sight and approximately 2000 sailors were drowned or otherwise killed in consequence. The untenable excuse put forward was that these ships were carrying contraband. But this begged the question by assuming, first, that there was contraband on board without making any search, and secondly, that the exceptional circumstances existed which alone justify sinking a ship for the carriage of contraband; nor did it in the smallest degree answer the charge of killing innocent persons. We need not repeat the emphatic condemnation of such

[1] *Declaration of London*, Articles 48–53.

practices by the Conference of Washington, 1921–1922, which has been stated earlier in this section.][1]

§ 192

The International Prize Court.

It is impossible to affirm that national prize courts are altogether satisfactory tribunals. Their existence is testimony to a general desire for legal adjustments in a sphere of human activity commonly held to belong almost entirely to force; but the very fact that they are national points to a grave defect. By means of them belligerent states become practically judges in their own cause. There is no need to attribute conscious partiality to the able men who occupy the seats of judgment in them, but unconscious bias there can hardly fail to be. International Law has not at present given us a code of naval warfare accepted by all civilized states, though it has taken giant strides in this direction during recent years. Meanwhile there are differences of view among nations on several important matters, and the jurists of a state do not escape the influence of the mental and moral atmosphere in which they have been born and bred. Add to this differences in legal systems and professional customs, and also in the organization of public justice, and it is easy to see how the most judicially-minded and learned of men may come to divergent conclusions on the same set of facts.

In order to remedy these defects both Great Britain and Germany laid before the Hague Conference of 1907 plans for the constitution of an International Prize Court. After a good deal of discussion they were amicably combined, mainly owing to the untiring labors of the representatives of France and the United States; [2] and the result stands on record in the twelfth of the thirteen Conventions of the Conference. The account which follows is taken in substance from the

[1] [Garner, *International Law and the World War*, vol. II, ch. XXXI. Oppenheim, *International Law*, vol. II, §§ 431, 431 *a*. Fauchille, *Droit International Public*, vol. II, §§ 1691[5]–1691[11]. Bellot, in *Grotius Society*, vol. I, p. 51.]

[2] Higgins, *The Hague Peace Conferences*, pp. 432–435.

author's *International Problems and Hague Conferences.*[1] The Court is to consist of fifteen judges nominated for six years by the powers represented at the Conference, and eligible for reappointment. Those appointed by Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia are always to sit; while the nominees of the other contracting parties sit by rota, their turns being distributed over a period of six years according to a table annexed to the Convention. There are to be deputy-judges as well as judges; and if one of the latter is absent or prevented from sitting his place is to be taken by that one of the former who was appointed as his substitute. Nine judges form a quorum. In all suits arising out of a war the judges appointed by the belligerent states may take part, on request being made by their governments. In that case a corresponding number of judges entitled to sit according to the rota have to withdraw, and lots are to be drawn to determine which of them shall retire. Further, both the captor state and any neutral power or powers interested in the proceedings may appoint a naval officer of high rank to sit with the court as assessor, but with no voice in the decision.[2] Thus at any sitting of the court there may be as many as fifteen judges and two or more assessors, or as few as nine judges with no assessor. In practice, no doubt, the numbers will vary between these two limits. Article 10 of the Convention provides that the judges are to be "jurists of known proficiency in questions of international maritime law, and of the highest moral reputation"; and by Article 13, before they take their seats they are to swear or make a solemn promise to discharge their duties impartially and conscientiously. Their position is one of great honor and dignity. They are to enjoy diplomatic privileges in the performance of their duties and when outside their own country. They are to sit at The Hague, and all the permanent official machinery of the Conferences — the Administrative Council, the International Bureau, the Secretary General and his staff — is to be at their disposal for the due performance and proper recording of their work.

[1] See pp. 141–148.

[2] See Articles 14–18.

The governments of all the signatory powers are to assist them in such matters as serving notices, summoning witnesses, and securing the attendance of experts. If they are divided in opinion as to their decision, the majority prevails. They will receive adequate remuneration, but it is expressly provided that it is not to come from "their own government or that of any other power." Payment is to be made through the International Bureau at The Hague, which will obtain the funds from the contracting parties in proportion to their share in the composition of the court.[1]

It will be noticed that the eight Great Powers have the preponderant influence to which their position entitles them, and an examination of the rota shows that the share of each of the other states has been carefully assigned in proportion to its present strength and historical importance. Yet due weight has been given to the fact that changes are constantly taking place in these particulars. All history shows that nations wax and wane; and observation of what is going on in the world around us brings home the conviction that the process instead of tending towards a final and permanent adjustment is continuing with accelerated rapidity. The Convention takes note of this, and provides in its last Article for a periodical revision of the constitution of the court on the demand of any power which deems its position therein inadequate.

We have described the International Prize Court. Let us now consider its functions and jurisdiction. The Convention contemplates that in the future, as in the past, questions of maritime capture should go in the first instance before the courts of the captor state. If by its law there is an appeal from the court of first instance to a higher court, such appeal may be made; but the case cannot be heard more than twice in the national courts. Any further decision that is wanted must be sought from the International Court; and "if the national courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the International Court." But it follows from what has been said before with regard to the conclusiveness of force between

[1] See Articles 20, 47.

opposing belligerents that as a general rule there can be no appeal from a national court to the International Prize Court when enemy property is concerned. The only exceptions occur where neutral as well as belligerent interests are involved, or where the question at issue depends on the interpretation of treaties or unilateral documents dealing with other than purely domestic affairs. On the other hand, appeals are allowed in all cases when the judgment of the national court affects the property of a neutral state or a neutral individual. The same distinction appears again in the regulations with regard to the parties by whom appeals may be brought. The belligerent powers are ruled out altogether, and belligerent subjects also, unless the judgment affects their property seized on board a neutral ship, or taken in alleged violation of a Convention between the belligerent states or of an enactment issued by the captor state. Neutral powers, however, may appeal whenever they deem the judgment injurious to their property and that of their subjects, or if the capture of an enemy vessel is alleged to have taken place in their territorial waters. Neutral individuals, too, have the right to appeal in protection of their property if their governments do not move; and the International Court will hear them unless they are forbidden by their own state to carry on the case. All these carefully drawn regulations proceed on the principle that neutrals are entitled to legal decisions in cases between themselves and belligerents. In them superior force has no effect on title, though it may settle the question of immediate possession. The important thing is to secure an impartial judgment on the points of law involved; and this the institution of an International Prize Court is intended to do.[1]

We now come to the crucial question of the law which the International Prize Court is to administer. No one doubts that it must decide in the first place according to the terms of any treaty applicable to the case and in force between the captor state and the state which is the other party in the proceedings, or whose subject is in this position. Nor would it be seriously disputed that in the absence of such a treaty

[1] See Articles 1–6.

the accepted rules of International Law must be applied as far as they bear on the matter in dispute. But what if no generally recognized rules exist, either because two or more schools of thought are in dispute over the matter, or because the points raised are so new that neither custom nor express agreement have had time to deal with them? Both contingencies are probable. Indeed, we may assume with confidence that a large proportion of the cases that reach the International Court of Appeal will come under one head or the other. How are they to be decided? In answer to this question the Convention declares that "the court shall give judgment in accordance with the general principles of justice and equity." [1] This direction has been a stumbling-block of many. Its very boldness overthrows the balance of the timid; and those who have been content that we should lumber along as best we could in the old ruts stand aghast at the audacity which would press forward in a new direction. The head and front of the offence of the clause we have just quoted is that it does undoubtedly give the court the power "to make the law" in the last resort. This was plainly stated by M. Louis Renault, the great French jurist, in the wise and statesmanlike report which accompanied the draft of the Convention. He justified the innovation on the ground that it would ameliorate the practice of International Law, and maintained that the eminent magistrates who would compose the court might be trusted to rise to the height of their mission, and supply the deficiencies of existing rules, till they had been codified by the action of governments. We may add that even then their extension by analogy would be required to meet the needs of a living and growing society, which on the morrow of the adoption of a code would proceed to throw up cases not provided for therein. The court contemplated by the brilliant plenipotentiary of France would therefore be necessary after, as well as before, the codification of the law of nations. If it comes into existence, we may regard it as a permanent institution.

The Convention was no exception to the rule which requires signature and ratification before the powers which negotiated

[1] See Article 7.

it are held bound by it. Moreover, it contemplates the possibility of a limited number of signatures, and provides that the court shall not come into existence unless there are enough signatory powers to furnish nine judges and nine deputy judges. It also makes arrangements for the revision of the list of judges entitled to sit, if the consent of any of the eight Great Powers or of any of the states mentioned in the rota should be lacking. In case the total number of judges should be less than eleven, seven are to form a quorum.[1] But it is clear that a court established by little more than half the powers would fail altogether to attain the great object of harmonizing and completing the Maritime International Law of the civilized world, while its decisions would be sadly lacking in moral authority if the minority included some of the most powerful of maritime states.

This brings us to a difficulty which seemed at first as if it might prevent the United States from helping to constitute the court to the initiation of which they contributed so powerfully at The Hague. The question was raised whether their Constitution did not by inference prohibit any appeal from the decisions of their Supreme Court in prize cases. It was, therefore, suggested that when there was a complaint against any of its prize judgments, the complaining party should be allowed to make application to the International Prize Court for compensation on the ground of illegal capture. This would not technically amount to an appeal, but would rank as a suit *de novo*. If the International Court pronounced in favor of the complainant, the indemnity it awarded would be paid by the Federal Government, and thus justice would be done, though not in the form prescribed at The Hague.[2] In order to carry out this plan it became necessary to negotiate a protocol allowing the suggested procedure in the case of those states whose constitutions rendered impossible the methods prescribed in the Prize Court Convention of 1907. This was done in September, 1910, and ratified by the American Senate in February,

[1] See Article 56.

[2] Higgins, *The Hague Peace Conferences*, pp. 443, 444; British Parliamentary Papers, *Miscellaneous*, No. 4 (1909), pp. 103, 104, and *Miscellaneous*, No. 5 (1909), p. 253.

1911.[1] Thirty-three powers have signed the Convention; but ten of them entered reservations against Article 15, which settles the composition of the court. None of these is of the first rank, and all were swayed by the argument that the privileged position accorded to the eight Great Powers constituted an infringement of the principle of the equality of sovereign states. This principle was stated and restated during the debates in the crudest manner, and without the slightest regard to practical considerations. Strength and influence were ignored, and equality before the law construed as involving equality in place and authority. But among the twenty-three powers who have accepted the Convention in its entirety are included the chief maritime nations of the world, and if they ratify the consent they have already given, the International Prize Court will soon become a reality.

It was hoped that the success of the Naval Conference of 1908–1909 would help materially to procure for the proposed court the active support of all states whose interests at sea are considerable. At first some were kept back by the fact that much of the law to be administered by the international judges was uncertain and disputed. But in the Declaration of London of 1909 were to be found rules for the settlement of most of the most controverted points. [The Declaration of London was never ratified, and the twelfth Hague Convention was practically useless without it. The Court was not used at all during the great war, and so many new problems on naval warfare occurred in the course of it, that prize law as set out in the Declaration needs a great deal of revision. Until the experience gained from 1914–1918 has been made the basis of an amended code, it would be unwise to expect adoption of an International Prize Court.] [2]

[1] [*American Journal of International Law* (1911) *Official Documents*, vol. v, p. 95, *Ibid.* (1912) vol. vi, p. 799.]

[2] For the text of the Hague Convention relative to the Establishment of an International Prize Court, see Whittuck, *International Documents*, pp. 190–206; Scott, *The Hague Peace Conferences*, vol. ii, pp. 473–507; *Supplement to the American Journal of International Law*, vol. ii, Nos. 1 and 2, pp. 174–202. For the text with an illuminating comment, see Higgins, *The Hague Peace Conferences*, pp. 407–444.

§ 193

History of the proposal to exempt private property from capture at sea in time of war.

From time immemorial the practice of capturing private property at sea has been carried on by belligerents. But within the hundred and fifty years [preceding the beginning of the twentieth century] a strong dislike to it sprang up in America and on the continent of Europe. The United States has favored the policy of exemption from the beginning of its national career. It was embodied in Franklin's treaty with Prussia in 1785,[1] but found no place in subsequent treaties with that power. In 1823 Mr. John Quincy Adams, as Secretary of State, proposed to the governments of England, France, and Russia that they should enter into a convention for the purpose of exempting private property at sea from the depredations of war, an exemption which he seems curiously enough to have regarded as equivalent to "the total abolition of private maritime war." [2] England and France declined to entertain the proposal, and, as Russia made her acceptance conditional on that of the other naval powers, nothing came of the effort to engraft it on the International Code. In 1856 another attempt was made by the American Government to obtain a general recognition of the principle of exemption. The powers assembled in Congress at Paris had drawn up and signed a Declaration on Maritime Law, the first article of which decreed the abolition of privateering. When this important document was submitted to the United States for signature, President Pierce and his Cabinet declined to give up for their country the right to employ privateers, unless all private property at sea, except contraband of war, was freed from liability to capture.[3] France, Russia, and Prussia, were willing to consent to this enlargement of the scope of the original Declaration; but the project fell through mainly owing to the opposition of Great Britain and a change of President in the United States.[4] In the correspondence

[1] *Treaties of the United States*, pp. 905–906.

[2] Wharton, *International Law of the United States*, vol. III, p. 261.

[3] Higgins, *The Hague Peace Conferences*, pp. 1–3.

[4] Moore, *International Law Digest*, vol. VII, pp. 563–581.

of 1861 on the subject of the Declaration, Mr. Seward, then Secretary of State, expressed a wish that it might be accepted; and when, in 1870, the Prussian Government notified that it would not capture private property at sea during the war which had just broken out with France, Mr. Fish, in acknowledging the receipt of the declaration in favor of exemption, gave utterance to the hope that "the government and people of the United States may soon be gratified by seeing it universally recognized as another restraining and harmonizing influence imposed by modern civilization upon the art of war."[1] In the following year he was able to do something towards the realization of his own wish by negotiating a treaty with Italy, which provided that in the event of war between the two powers, the private property of the citizens and subjects of each should be exempt from seizure at sea, unless it were contraband of war.[2] The American delegates to the Hague Conference of 1899 were instructed to bring the matter forward. As it was not included in the official programme, they had some difficulty in doing this; but at last they so far succeeded that the Conference in an official "wish" referred the proposal to grant immunity to private property in naval warfare to a subsequent Conference for consideration.[3] This was given in 1907, when the second Hague Conference debated the subject with great earnestness and ability. In the end the American proposition failed to obtain the well-nigh general adhesion necessary for its adoption, though it was supported by the majority of the votes actually cast. The only tangible result of the discussion was the embodiment in the Final Act of the Conference of a "wish" to the effect that "the powers may apply, as far as possible, to war by sea the principles of the Convention relative to the laws and customs of war on land." As private property in land warfare is subject to the right of requisition and other interferences, this

[1] Wharton, *International Law of the United States*, vol. III, p. 296.

[2] *Treaties of the United States*, p. 584.

[3] Holls, *The Peace Conference at the Hague*, pp. 306–321; Moore, *International Law Digest*, vol. VII, pp. 470–472.

"wish" may be regarded as an expression of a purely platonic affection for the American project.[1]

The facts just narrated bring two points into prominence. It is quite clear that the United States is in favor of exemption as a fixed and settled policy, but does not regard it as part of the public law of the civilized world. It is something to be desired and worked for, not something that has been already obtained. [One of the "Fourteen Points" laid down by President Wilson in January, 1918, as the substance of the war aims of the United States was, "Absolute freedom of navigation upon the seas . . . except as the seas may be closed in whole or in part by international action for the enforcement of international covenants." The precise meaning of this is disputed. One view is that it signified complete freedom of passage to all neutral shipping in time of war; but a more extreme interpretation is that it extended freedom to enemy shipping as well.] [2] In Europe the conflict of 1866 between Prussia and Italy on the one side, and Austria on the other, was fought from beginning to end without resort to the capture of private property at sea. But the influence of the particular view now under consideration has not been confined to one war in which naval operations played a subordinate part. It made itself felt in Article 211 of the Italian Maritime Code, which forbids Italian ships of war to molest the merchant vessels of any enemy who refrains from capturing the private property of Italian subjects; and its strength was further manifested in the Commercial Treaty of 1871 between the United States and Italy, whereby, as we have already seen, the two countries agreed to grant exemption, on the footing of reciprocal concession. There seemed at one time every

[1] Scott, *The Hague Peace Conferences*, vol. I, pp. 698–704; Higgins, *The Hague Peace Conferences*, pp. 69, 78–80; Report of M. Fromageot given in *Deuxième Conférence International de la Paix, Actes et Documents*, vol. I, pp. 245–249; Scott, *American Addresses at the second Hague Peace Conference*, pp. 2–24.

[2] [*History of the Peace Conference of Paris*, vol. I, p. 193; vol. II, pp. 145–146, Cf. Quigley, in *American Journal of International Law* (1917) vol. XI, p. 22. Hays, *Ibid.* (1918) vol. XII, p. 283. C. S. Davison, *Freedom of the Seas* (1918).]

prospect of freedom from molestation for peaceful commerce in the great war of 1870–1871 between France and Germany. Prince Bismarck declared at its commencement that private property on the high seas would be exempt from seizure by the ships of the King of Prussia without regard to reciprocity. But in January, 1871, the concession was withdrawn, because France acted upon her full rights as a belligerent, and made prizes of German merchantmen.[1] Consequently this last instance may be quoted for or against the contention that the new ideas are gaining ground.

If we turn from the deeds of rulers and commanders to the opinions of jurists, we shall find a great mass of modern authority in favor of the proposed change. During the eighteenth century the voices raised in its favor were few and far between. Franklin in America, Mably and Galiani in Europe, were its chief advocates. But now its supporters are numerous and active. Bluntschli, De Martens, Bernard, De Laveleye, Calvo, Hall, Maine, and many others still living, have championed the new view. The Institute of International Law has [on several occasions] pronounced in its favor,[2] and though there are signs of a reaction in the works of the younger generation of modern publicists,[3] the majority of jurists are probably on its side. Why then, it may be asked, has it not been adopted by the maritime powers, and made into a rule of International Law, with the necessary exceptions and qualifications, which may be found duly set forth in the Maritime Code adopted after long deliberation by the Institute of International Law at its session at Heidelberg in 1887.[4] The answer is that the immunity of private property from capture at sea will not be decreed till the rulers of the great majority of states are convinced that it will not deprive them of any important advantage in warfare which they possess under present conditions. Some are already in this balanced state of mind. Others hold that the

[1] Moore, *International Law Digest*, vol. VII, p. 468.

[2] *Tableau Général de L'Institut de Droit International*, pp. 191, 196. [Annuaire (1912), vol. XXV, pp. 600–602.]

[3] E. g. Latifi, *Effects of War on Property*, pp. 117–143.

[4] *Tableau Général*, pp. 196, 199, 200.

change would be positively advantageous, while a powerful section look on it as hurtful. Opinion is fluid and uncertain, as the proceedings at the Hague Conference of 1907 conclusively showed. No alteration in existing rules was made; but in the discussion on the American proposal Brazil suggested a right to requisition in case of necessity, Belgium the sequestration of enemy ships and cargoes during the war, Holland the exemption from capture of vessels as to which the enemy certified that they would not be put to warlike uses, and France the abolition of prize money and the grant of compensation to private individuals from the state for losses sustained by captures.[1] Even Great Britain, the chief opponent of the change, held out hopes of assent, if the desired immunity were coupled with a general diminution of armaments.[2] All this betrays an uneasy consciousness that the present law requires alteration, coupled with inability to discover the right line of amendment.

## § 194

Arguments for and against the proposed exemption.

Those who are in favor of the proposed exemption rely largely on humanitarian considerations. They point to the security from indiscriminate pillage now enjoyed by private property in war on land, and denounce as barbarous its continued liability to capture at sea.[3] The defenders of the present practice point out that the analogy of land warfare is deceptive. When an invader occupies a district, he can levy contributions and requisitions on private property, and compel the inhabitants to perform certain services. Thus he not only deprives the enemy state of its resources, but utilizes them for his own purposes. But at sea a vessel of the hostile country must either be captured or allowed to go free. It is impossible to seize a fraction of her, and in most cases it would be impossible to transfer in a reasonable time any considerable portion of her cargo. Yet if she is set at liberty, both she and the goods she

[1] Higgins, *The Hague Peace Conferences*, pp. 80, 81.

[2] British Parliamentary Papers, *Miscellaneous*, No. 1 (1908), pp. 15, 16.

[3] Macdonell, *Some Plain Reasons for Immunity from Capture of Private Property at Sea*, pp. 4–9.

carries swell the resources of the enemy, and help him to continue his war. Moreover the capture of a merchantman is as orderly a proceeding as the occupation of a village. There is no more pillage in the first case than there is in the second. If there be any moral difference it is in favor of the naval operation; for women and children are rarely to be found on board a trading vessel, whereas they are always present in the smallest cluster of land habitations. Indeed, it may be contended with justice that there is no more humane method of reducing an enemy's means of carrying on war than the destruction of his sea-borne commerce. It involves little bloodshed. Now that the detention of the crews of captured merchantmen as prisoners of war has been practically abolished, it no longer means deprivation of liberty to peaceful mariners. What is doubtful is not the humanity of the practice, but its effectiveness, as we shall soon show. The argument that the suggested change is but a comparatively trivial development of the concession made when the maxim *free ships, free goods* received general assent is met by traversing the alleged fact. The contrary is declared to be more nearly true. It is asserted that to destroy an enemy's commercial marine is one of the most effective methods, and in the case of a power whose chief weapon is his fleet, the only effective method, of weakening his resources and inducing him to sue for terms.

The doctrine, borrowed from Rousseau, that war is a relation of state to state, and has no concern with individuals except as agents of the state, has been so often quoted with approval that it is regarded in many quarters as axiomatic. The capture of private property at sea is clearly inconsistent with it, and this alone is deemed sufficient ground for an alteration of practice. But in truth the supposed axiom is a transparent fallacy. Belligerents constantly exercise severities against private individuals belonging to the enemy state, though promiscuous robbery and slaughter is no longer permitted. A simple enumeration of the rights possessed by an invader over the non-combatant inhabitants of the territory under his military occupation is sufficient to make good this assertion. Land warfare, therefore, which is constantly held up as an example by the

advocates of change, takes no account of the boasted doctrine. Why then should sea warfare accept it on pain of being denounced as inferior in humanity?

In fact the controversy is unreal and hopelessly out of date in so far as it depends on purely humanitarian considerations. Armed conflicts cannot be waged without much suffering; but on the whole maritime operations involve less of human misery than those which are conducted on land. The belief that war is an evil in itself, and therefore to be restricted if it cannot be destroyed, is the true moral justification of the attempt to protect sea-borne commerce from its attacks. The idea of any special inhumanity in them may be dismissed as an illusion; but nevertheless to end them by international agreement would be a distinct gain, unless wars were so lengthened thereby that the sum total of loss and suffering was increased rather than diminished. Here lies the real moral problem; and we see at once that it is closely connected with a material problem. If it be true that the capture of private property at sea shortens wars considerably, then it will be wise and right to retain the practice. If, on the other hand, no such effect is produced, but instead unnecessary loss and annoyance is caused to neutrals as well as to enemies, then the right to make such captures should be abolished. There is much dispute as to both of these questions. In order to discuss them fruitfully, we must take into account the present condition of warfare and commerce and national armaments. All three are constantly changing, and their changes affect the material self-interests of nations. These in their turn affect the minds of rulers, who are not likely to consent to a limitation of belligerent rights from purely altruistic motives.

We will begin by stating the exact nature of the proposal which is generally, but inadequately, described as the exemption of private property from capture at sea in time of war. Several kinds of private property are already exempt. Neutral goods in neutral vessels and enemy goods in neutral vessels are unconfiscable, unless they are contraband in character. When innocent neutral goods are found in enemy vessels, the vessels are liable to seizure, and must be brought in for adjudication. This

involves the bringing in of the cargoes also, but on proof of neutral character they are released. Speaking generally, and leaving out of account special circumstances, the only case in which goods can now be captured at sea is when they are enemy goods laden on board an enemy vessel. What is proposed is to free from liability to seizure both enemy ships and enemy goods found on board such ships, provided always that they are not implicated in a contraband traffic or an attempt to break blockade. If this proposal were carried out, a great concession [at any rate on the practice existing before the outbreak of the great war] would [have been] made to belligerent ship-owners and traders, and a smaller one to neutral shippers, who would [have escaped] the risk and delay inseparable from a suit before a belligerent prize court. But the concession to enemy interests would not [have been] quite so great as it appears at first sight. Inshore fishing boats and petty local trading craft are already protected from capture, as also are cartel ships, hospital ships—private as well as public—and, with certain limitations, merchantmen found in an adversary's port at the moment of the outbreak of hostilities or met at sea immediately after. We see, therefore, that a considerable portion of the trade carried on by enemy vessels is now free from molestation. Moreover, the freedom which it is proposed to grant to the remainder is limited by the proviso that vessels and cargoes shall still be subject to the law of contraband and blockade, and by the continued application to them of the penalties inflicted on vessels that carry false papers, resist search, or engage in services connected with warlike operations. Whenever the private property of enemy subjects afloat gives direct aid to the enemy government in its war, it will be liable to capture under the proposed new rules, just as it is at present.

The question at once arises whether indirect aid is important enough to affect the issue of a struggle. And we have to remember that it is only indirect aid given by means of commerce carried on under the belligerent flag which counts in the present connection, for goods arriving or departing in neutral vessels cannot be captured unless they are contraband in character or engaged in an attempt to violate a blockade. Confining our

attention, therefore, to what is relevant, we discover that the question whether the capture of private property at sea will cripple an adversary and bring the war to a speedy end is capable of more answers than one. Countries like Norway and Greece, which possess a very large mercantile marine and a weak fighting fleet, would find themselves ruined in a short time if a great naval power made war on their commerce. Countries with a small mercantile marine and a powerful navy, would be able to support a struggle at sea as long as their warships could continue the conflict, without regard to the fate of the few merchantmen that navigate under their flag. These are extreme cases; but the majority of states are in a very different position. They are continental, and a large portion of their external trade comes and goes over their land frontiers. They possess a considerable mercantile marine; but much of what they export and import by way of the ocean reaches and leaves them in foreign vessels. If their adversary in a war swept their commercial flag from the seas, they would doubtless suffer appreciable loss and inconvenience. [This would be so if the law of contraband and blockade stood as it was before the great war. It is so difficult to state what it is now, or is likely to be in the future, that further speculation on the position of countries of this type would be futile.]

We have reserved to the last a consideration of the case of Great Britain, because it is unique. Japan is the only other power that occupies a position of similarity in that it is at once insular, naval, and commercial. But the differences are as great as the resemblances, since Japan is military as well as naval, and does not possess a world-wide empire, nor is its foreign trade essential to the subsistence of its people. To no other state is the security of its sea-borne commerce so overwhelmingly important as it is to Great Britain, and no other state possesses such enormous means of striking at the sea-borne commerce of its foes. The first consideration would incline British statesmen to welcome the proposed immunity, the second makes for its rejection. Let us try to strike the balance between the two, premising that any conclusions we may reach must be cautiously advanced, seeing that political,

naval, legal, commercial, and financial experts speak with divers tongues and varying degrees of emphasis.

It is admitted on all sides that a serious attack on the overseas trade of the British Empire would be exceedingly dangerous, unless it could be repelled before it had time to develop. Twelve million tons of shipping, and goods to the amount of something like two thousand million pounds sterling in a single year, form a big target for the aim of the commerce destroyers of an enemy. And it must be remembered that British ship-owners are cut off from the resource of transferring their vessels to neutral flags, not only by the practical certainty that such transfers would not be recognized by the enemy, but by the impossibility that neutral traders could find enough capital to purchase, or enough seamen to man, such an enormous mass of shipping. In fact they would be unable in such an emergency either to take over the merchantmen of the British belligerent, or to replace them by merchantmen of their own. And as Great Britain must carry on her trade or perish, it would have to be carried on as before in British bottoms, notwithstanding the risks to which it was exposed. Yet security is the life-blood of commerce, and any losses in one quarter would send up freights and prices all over the Empire, and might easily cause a panic far more disastrous than a bad defeat.

British naval experts are confident of the ability of the royal navy to ward off these dangers. But it is impossible to rely with any degree of certainty on the realization of this sanguine anticipation. And yet a temporary reverse, the loss of the command of an important ocean highway for a few weeks, would work such havoc with her commerce that it might take years to recover itself. Disaster is at least possible, and the possibility is so terrible, involving as it does the prospect of starvation and bankruptcy, that it might be wise to avoid it by consenting to the immunity of private property at sea, even if an effective means of striking at a possible enemy were lost thereby. [The author's conclusion was that, on the whole, the abolition of the capture of private property at sea within the limits which he

indicated would be beneficial. But his lamented death deprived him of the opportunity of taking into account the events of the great war. And they clearly show that further discussion, or indeed any discussion at all, of the problem is merely beating the air until there is agreement on two points: — (1) What does freedom of the seas mean? (2) What is signified by the terms contraband trading, blockade running, and unneutral service? If freedom of the seas means the exemption from capture in time of war of all sea-borne commerce, enemy and neutral, there is no need to answer the second question, for it does not arise. But in fact there is no unanimity as to the answer to the first question; and, though the author expressly excludes from immunity ships engaged in contraband trading, blockade running, or unneutral service, yet many other jurists would take a far wider view of freedom of the seas. Moreover, the law as to the two former offences has been thrown into such confusion by the occurrences of the great war that it is practically impossible to state it with certainty. And until this can be done, the arguments for or against exemption are on shifting sand. We can test this by the difficulty of the British position since the war. By the superiority of her navy, Great Britain cut off essential supplies from Germany and reduced her enemy to submission quite as much by starvation as by the direct military successes of her allies and herself. And so far it would appear that she would be wise to retain the right of capturing property at sea. But whether the "economic blockade" would have been so effective, if the law of blockade and contraband as it stood in 1914 had been adhered to, is extremely doubtful. We are not concerned here to say why great extensions of it took place. It is enough for present purposes that they did take place. But whether they represent law now, no one can definitely say; and until that is settled, and unless it is further assumed that the British navy will never be beaten, no one can be sure of the policy of Great Britain. Just the same uncertainty haunts the arguments on the other side. The losses suffered by the British mercantile marine were so terrible as gravely to imperil Great Britain's chances of success in the

war, and these losses, be it noted, were inflicted by the submarines of an enemy whose surface warships had been swept from the sea. This seems to be a reason in favor of exemption of merchantmen from capture. To this, it may be replied that the German practices were outrageous breaches of the law and not likely to be repeated in a future naval war. But it is doubtful whether the sanctions of International Law are strong enough to justify this prediction.

Such are the *imponderabilia* in the British case, and in a less degree they will affect the arguments of every other state. Complete exemption of all neutral and enemy shipping from capture would reduce a naval battle to a gladiatorial exhibition that would lead to nothing except ability of the victor to stop the transport of enemy troops by sea. On the other hand, exemption from capture of those ships only which are not engaged in contraband trading, blockade running or unneutral service, would, on an extended interpretation of these offences, reduce the exemption to its vanishing point. If the first of these extreme views should prevail, no naval state would agree to exemption; if the second, no state will ask for it. Until some mean between the two is adopted, further argument is idle.]

# CHAPTER VI

## THE AGENTS, INSTRUMENTS, AND METHODS OF WARFARE

### § 195

The employment of certain agents, instruments, and methods of warfare has given rise to many disputed questions. With regard to agents, we may say with confidence that soldiers and sailors of the regular armies and navies of the belligerents, including fully organized reserves and auxiliary forces, are legitimate combatants. The agents of warfare.

The only exception to this rule occurs when a belligerent finds some of his own subjects in the ranks of his enemies. In that case he may execute them, if they fall into his power. Neutral subjects may, however, join the fighting forces of a belligerent without fear of anything beyond the ordinary risks incident to hostilities. On the one hand no special severities may be exercised against them, and on the other they cannot claim the protection of the neutral character they have abandoned.[1] They are neither more nor less than ordinary combatants. If recruiting agencies have been established on neutral territory, or if a steady stream of recruits has been allowed to flow from neutral soil to a belligerent army or navy, the other belligerent may have a good case against the neutral government for culpable partiality.[2] But he has no right to visit his displeasure on individual combatants of neutral nationality. The question has sometimes arisen whether neutral subjects resident in a belligerent country may be compelled to enter the ranks of its fighting forces. The answer must be in the negative, except perhaps in the rare cases of invasion by cruel savages or revolt by the enemies of social order.[3]

When we pass beyond the proposition that the duly en-

[1] *Fifth Hague Convention of 1907*, Article 17.

[2] See part IV, ch. iii.

[3] Hall, *International Law*, 7th ed., § 61.

rolled members of organized armies and navies are lawful combatants, we enter into a region of doubt and difficulty. Some agents of warfare are deemed lawful in certain circumstances and under certain conditions, but not in other circumstances and under other conditions. Others are forbidden altogether according to one set of authorities, while another set allows them with various restrictions. The only course to follow, in order to attain satisfactory results, is to consider each of these difficult cases separately.

§ 196

We will take first the question of whether it is lawful to use

*Guerilla troops,*

and, if so, under what conditions of leadership, organization, and armament. They may be described as bands not belonging to a regular army and not under strict military discipline, but nevertheless operating actively in the field and devoting themselves entirely and continuously to warlike avocations without intervals of the peaceful pursuits of ordinary life. They often perform valuable services to their own side by attacking convoys of arms and provisions on the way to the enemy, cutting off his communications, blowing up bridges and destroying railways in his rear, intercepting his despatches, and harassing him in the numberless ways that patriotic ingenuity can suggest and superior mobility carry out. Knowledge of the country, coolness, and daring are the conditions of success in guerilla warfare. With small means it may inflict irreparable damage upon the side against which it is directed; but those who engage in it are free from many of the restraints of more regular combatants, while at the same time their opportunities for plunder and outrage are numerous and tempting. It is easy, therefore, to understand the unfavorable opinions of partisan bands usually expressed by great military authorities.[1] When standing armies became common in Western Europe professional soldiers were unwilling to allow the rights of lawful combatants

Guerilla troops.

[1] E.g. Halleck, *International Law*, ch. xviii, § 8.

to any but those belonging to the regular forces of the enemy. But in the great cycle of wars which began with the French Revolution, the most powerful states of the European continent found good reason to rely on the patriotism of their populations. Irregular troops came, therefore, to be regarded as permissible even by military men who often busied themselves with the organization of popular levies. The principle that a country may be defended by forces other than its standing army was conceded, the degree of irregularity which may be tolerated forming the only problem left for solution.

In the Franco-Prussian war of 1870 the French raised irregular bands of *Francs-Tireurs*, which the Prussians declined to recognize as lawful combatants unless each individual member of them had been personally called out by legal authority, and wore a uniform or badge irremovable and sufficient to distinguish him at a distance. At the Brussels Conference of 1874[1] the matter was thoroughly discussed from every point of view. The representatives of the great military powers naturally desired to keep spontaneous movements within the narrowest possible bounds, while the delegates from the secondary states, who have to rely for their defence chiefly upon the patriotism of their people, endeavored to give the widest extension to the right of resistance against an invader. The differences of opinion thus brought into prominence have never been entirely reconciled. But in the matter of guerilla bands the Conference succeeded in coming to an agreement which was adopted in 1880 with a few changes of form by the Institute of International Law[2] and received the consecration of general assent when the Hague Conferences of 1899 and 1907 embodied it in the first Article of their Regulations respecting the Laws and Customs of War on Land.[3] This Article may now be regarded as part of the war law of the civilized world. It

[1] See § 162.

[2] *Tableau Général de L'Institut de Droit International*, p. 173.

[3] Higgins, *The Hague Peace Conferences*, p. 219; Whittuck, *International Documents*, pp. 38, 129; Scott, *The Hague Peace Conferences*, vol. II, pp, 117, 377; *Supplement to the American Journal of International Law*, vol. II. Nos. 1 and 2, p. 97.

placed on an equal footing as regards rights and obligations regular armies, and volunteer corps which

(*a*) Are commanded by a person responsible for his subordinates,

(*b*) Wear a fixed distinctive badge, recognizable at a distance,

(*c*) Carry arms openly, and,

(*d*) Conform in their operations to the laws and customs of war.

It is to be hoped that the concession of the first of these conditions marks the definite abandonment of the theory that members of partisan bodies must, individually and collectively, be summoned to arms by their government and connected directly with its military system. The second condition is just and reasonable, if it be not interpreted to mean that the distance must be considerable. What really matters is that members of guerilla bands should be distinguishable from ordinary civilians by the naked eye. A badge which is visible as far off as the inconspicuous uniform of modern infantry should be amply sufficient. The great point to be secured is its irremovable character. A man cannot have the slightest moral right to the privileges of a combatant, if he appears one minute as the armed defender of his country and the next as a harmless peasant tilling his fields in peace and quietness. The third condition is justified by the same consideration. The inhabitants of an invaded country must choose whether they will fight or whether they will go about their ordinary business. They cannot do both. The fourth condition is demanded by humanity. Irregular soldiers who do not conform to the laws of war become mere criminals and deserve the severest punishment.

On the whole there seems reason to be satisfied with these rules. They give scope to the spontaneous activities of patriotism, without neglecting either the claims of mercy or a reasonable consideration for the safety of the invading belligerent. But nevertheless they are so elastic that in practice a great deal will depend on the character and temperament of the generals in command. It should be noted that the rules deal throughout with bodies of men, not with individuals.

If a member of a band is captured while detached by his chief for separate service, such as cutting a telegraph wire or blowing up a bridge, he must prove that he belongs to an organized unit, before he can claim the treatment of a lawful combatant. Moreover, it is assumed that the bands are fighting for a cause and a government still in existence. If they keep up a partisan warfare in hills and remote fastnesses after the complete destruction of the state authority in whose interests they are fighting, in strictness of law they have ceased to be entitled to the rights of combatants.[1]

There are a few cases not covered by the Hague Code, though they might easily occur in war, such, for instance, as the defence, by isolated individuals or small groups acting on the spur of the moment, of their households against outrage or their property against plunder, or the destruction in similar circumstances of roads or bridges in unoccupied districts. This latter was brought forward at the Brussels Conference, but dropped without being settled, owing to the expression of a general opinion that it would be unwise to attempt to formulate any rule that would cover it.[2] Matters such as these come under "the principles of the law of nations, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."[3]

## § 197

We have next to consider the subject of

### *Levies en masse.*

Not only do they differ from irregular bands in some essential circumstances, but they also differ so widely among themselves that the same provisions will not apply to all of them. When the whole manhood of a country is called to arms by its government and drafted into its armies, there can be no doubt as to the legality of the process. Such a levy is merely a specially drastic and com-

Levies *en masse.*

[1] Oppenheim, *International Law*, vol. II, § 60.

[2] British Parliamentary Papers, *Miscellaneous*, No. 1 (1875), p. 265.

[3] *Preamble of the Fourth Hague Convention of 1907.*

prehensive method of recruiting. Its adoption is a matter of internal policy, not of international concern. A good example is to be found in the French levy *en masse* of 1793, which filled the ranks of the revolutionary armies with brave and devoted soldiers. Another is afforded by the Boer War of 1899–1902, when all the able-bodied men of the Transvaal and the Orange Free State were placed in the field. The British Government would have had no right to regard them as unauthorized combatants on that account, though it might, had it so desired, have raised the question on the point of the absence of distinguishing marks. Another kind of levy *en masse* may take place in countries where the entire male population is passed through the army. If at the approach of an invader the people rise, either spontaneously or in obedience to an order from the government, and at once adopt the military organization to which they have been trained, they are to be regarded as regular combatants. The Delegate of Germany at the Brussels Conference alluded to this as a possible case, and pointed out that in his own country there was a *Landsturm* numbering nearly three million men, who would form the levy *en masse* in case of necessity.[1]

But a different question arises when the ordinary untrained inhabitants of a non-occupied district rise at the approach of an invader, and either alone or in conjunction with regular troops endeavor to beat him off. This is a not infrequent case; and at the Brussels Conference of 1874 the smaller powers of Europe contended almost passionately for its legality. After a long discussion it was agreed to consider such bodies of men as belligerents "if they respect the laws and customs of war." The first Hague Conference laid down the same condition, and the second added another to it. They must carry arms openly. If these two simple and necessary requirements are complied with, the population of a territory that has not been occupied who on the approach of an invader spontaneously take up arms to resist him are deemed lawful combatants, even though they have not had time to organize themselves in the manner provided for irregular bands. It was rightly

[1] British Parliamentary Papers, *Miscellaneous*, No. 1 (1875), p. 263.

considered that the masses of a popular levy extending over a considerable area of country would be sufficient evidence of their own hostile character, even though no badges were worn by the individuals of whom they were composed. But it may be questioned whether invaded states, in their own interests, ought not to insist that there should be at the head of the levy a responsible leader, since Article 3 of the fourth Hague Convention of 1907 makes a belligerent government liable to pay compensation for violations of the laws of war on land "committed by persons forming part of its armed forces." And when the rising takes place in a limited area, it may be difficult to tell whether those who rise are to be regarded as a guerilla band or as a levy *en masse*. This difficulty occurred during the Japanese invasion of the island of Sakhalin in 1905. The town of Vladimirowka was defended by a number of Russian convicts. They had no mark whereby they could be distinguished from the ordinary inhabitants, and they were not under the command of any chief. If they claimed to be an irregular band, they were leaderless and badgeless. If they claimed to be a popular levy resisting invasion by a spontaneous impulse, they were not inhabitants. In neither case did they know or observe the laws and customs of war. About a hundred and twenty of them were shot after trial by court martial, though their captors were not clear in what capacity to regard them.[1] The decision to execute them was probably right, since they satisfied the conditions of neither kind of irregular belligerency. But it is easy to see that in less conclusive circumstances the lives of prisoners might depend on whether they were regarded as members of a band or members of a levy *en masse*.

A case apart from all the others, and least likely of any to be treated with leniency, occurs when the inhabitants of occupied districts break out into a general insurrection against the invaders. The army of occupation is obliged for the sake of its own safety to treat such insurgents with the utmost severity. The codes of the Brussels Conference and the two Hague Conferences are silent on the subject of the fate in store

[1] Ariga, *La Guerre Russo-Japonaise*, pp. 86–88.

for them, and so is the manual of the Institute of International Law, while Article 85 of the Instructions for the Armies of the United States renders them liable to the death penalty under the name of "war rebels." The constant conflict between the views of the great military powers and the secondary states always became more marked than usual when their treatment was discussed. In consequence no mention was made of the matter in the *Règlement* attached to the Hague Convention with respect to the Laws and Customs of War on Land; but there can be no doubt that an invader is allowed by the laws of war, as deduced from usage, to treat all concerned in such risings as unauthorized combatants. Indeed, this proposition is not seriously controverted. The objections raised are directed against any verbal recognition of it that would seem tantamount to a surrender of high-souled patriots by their own government to the enemy's executioners.[1]

§ 198

We pass on to deal with the employment of

*Savage and imperfectly civilized troops.*

Savage and imperfectly civilized troops.

They may be embodied, drilled, and disciplined as soldiers in the regular armies of civilized powers, or they may be used as allies and auxiliaries organized in their own way and under the command of their own chiefs. In the latter case the amount of control which can be exercised over them is very small; and it is much to be wished that International Law could prohibit the acceptance of assistance from such unsatisfactory allies. But nothing of the kind has been done. Civilized states receive without scruple the aid of savage tribes [not only] in their warfare with barbarous or semi-barbarous foes, [but] even when both the principal belligerents are civilized. Throughout the eighteenth century the English and French habitually employed Red Indian Tribes in their North American wars. The British let them loose against the revolted Colonists, and the Colonists did their best to turn them against Great Britain. The

[1] British Parliamentary Papers, *Miscellaneous*, No. 1 (1875), pp. 255, 263.

Russians sent Circassians into Hungary in 1848, and the Turks flooded Bulgaria with Bashi-Bazooks in the war of 1877. But in the Boer War of 1899–1902 both sides abstained from sending the natives into the field as fighting men. The stress of conflict however led to their employment in work which was barely distinguishable from that of soldiers. The British used them as drivers and guides, and sometimes as spies. The Boers, for whom they dug trenches, frequently shot those who had rendered what were deemed war services to the invaders. The British then armed their Kaffirs for purposes of self-defence, and in the last part of the war employed them as night-watchmen on the blockhouse lines and along the railways.[1] We may perhaps venture to hope that the force of enlightened opinion will before long compel the leading members of the family of nations to refrain from putting savages or semi-savages into the field, unless their foes themselves are barbarians. For the disuse of savage allies in these latter cases we shall probably have to wait till the feeling of human brotherhood has grown much stronger than it is to-day.

There can be no doubt about the legality of taking recruits from barbarous or inferior races and forming them into troops and regiments. If they are placed under military discipline, organized as part of the army of a civilized state, and led by civilized officers, they may be used without violation of the laws of war. The United States has its negro cavalry which it employed in the war of 1898 against Spain;[2] the French their Turco brigades; the British their Ghoorka regiments. There is hardly a power possessed of a colonial empire, or ruling over martial races, which does not enrol native troops. International Law neither forbids their enlistment nor places limitations upon their employment. But it would certainly be humane to reserve them for use against border tribes and in warfare with people of the same degree of civilization as themselves. [It was alleged by Germany that atrocities were committed by some of the African troops employed against her during the great war. This certainly did not apply to the

[1] *Times History of the War in South Africa*, vol. v, pp. 249–251, 255.

[2] Roosevelt, *Rough Riders*, p. 73.

South African native troops whose conduct was exemplary and in marked contrast with the behavior of some of the German troops. And if the charge were true of other African troops, it seems that these outrages were isolated and such as occur exceptionally even among fully civilized troops.] [1]

§ 199

We must now consider the legality of

*Spies.*

Spies.

Article 29 of the Hague Conference Code for land warfare lays down that "a person can only be considered as a spy when, acting secretly or under false pretenses, he obtains or tries to obtain information in the zone of operations of a belligerent with the intention of communicating it to the hostile party." It goes on to declare that soldiers who have penetrated within the enemy's lines for the purpose of obtaining information, without disguising their military character, are not to be considered as spies; neither are military men and civilians carrying out their mission openly, and charged with the transmission of despatches either for their own army or for that of the enemy. It also excludes individuals sent in balloons to carry despatches or perform other services. Article 30 lays down that "a spy taken in the act, shall not be punished without previous trial;" and Article 31 adds that the treatment of a prisoner of war is to be accorded to the spy who, after carrying out his mission and rejoining the army to which he belongs, is subsequently captured by the enemy. These rules embody the best and most humane modern practice, and indeed go somewhat beyond it in insisting upon a trial of the captured spy, who has often been shot or hanged on the spot with scant ceremony. They further mark the definite abandonment of the strange theory adopted by the Germans during the siege of Paris in 1870–1871, that those who reconnoitred from balloons were guilty of espionage and therefore liable to the penalty of death. [This does not of course exclude from the penalties of espionage

[1] [Garner, *International Law and the World War*, vol. I, §§ 191–194.]

those who employ aircraft secretly or under false pretences for the purpose and in the manner described above.][1] The still more strange theory of Admiral Alexeieff, produced during the Russo-Japanese War, that newspaper correspondents sending off messages by wireless telegraphy from neutral steamers might be treated as spies seems to have perished at the moment of its birth.[2]

The customary law on the subject of spies allows commanders to use them, and to evoke the services they render by the promise of rewards. But too often the taint of personal dishonor is held to attach itself to them indiscriminately, whereas in reality they differ from one another as coal from diamonds. This point is well brought out by a significant passage in Napier's *Peninsular War*.[3] The author, in describing how admirably Wellington was served in the matter of information, says: "He had a number of spies among the Spaniards who were living within the French lines; a British officer in disguise constantly visited the French armies in the field; a Spanish state-counsellor living at the headquarters of the first corps gave intelligence from that side, and a guitar-player, of celebrity, named Fuentes, repeatedly making his way to Madrid, brought back advice from thence. . . . With the exception of the state spy at Victor's headquarters, who being a double traitor was infamous, all the persons thus employed were very meritorious. The greater number, and the cleverest also, were Spanish . . . who, disdaining rewards and disregarding danger, acted from a pure spirit of patriotism, and are to be lauded alike for their boldness, their talent, and their virtue." Considerations such as these should serve to mitigate the harsh judgments sometimes pronounced on spies as a class, as if they were all alike. It is impossible to arrive at any reasoned conclusions unless we distinguish, as Napier does, between those who carry devotion and patriotism to the point of risking their lives in cold blood and without any of the

[1] [Fauchille, *Droit International Public*, vol. II, § 1440 [42].]

[2] Lawrence, *War and Neutrality in the Far East*, 2d ed., pp. 83–92. [Higgins, *War and the Private Citizen*, pp. 91–112.]

[3] Vol. IV, bk. XIV, pp. 220–221.

excitement of combat, in order to obtain within the enemy's lines information of the utmost importance to their country's cause, and those who betray the secrets of their own side for the sake of a reward from its foes. The first are heroes, the second are traitors; and it is the height of injustice to visit both with the same condemnation. Military reasons demand that the right to execute spies, if caught, should exist; but unless considerations of safety imperatively demand the infliction of the last penalty, a general should commute it into imprisonment. It should, moreover, be clearly recognized that in many cases the execution, though necessary for the safety of those who inflict it and the success of their cause, involves no more stigma than a fatal wound upon the battle-field.

§ 200

Hitherto we have dealt with human agents employed in war. We must now pass on to its instruments and methods. It will not be necessary to deal with any but those which are prohibited, or allowed only on conditions. The first to be considered are

*Privateers.*

The instruments and methods of warfare — Privateers.

They may be defined as vessels owned and manned by private persons, but empowered by a commission from the state, called a Letter of Marque, to carry on hostilities at sea. The law declared the commission to be revocable for bad conduct on the part of the privateer; and other means were taken to secure that she did not violate the laws of war, such as the lodgment of security and the enforcement of liability to search by public vessels of the country whose flag she carried. But, in spite of all precautions, privateers were always a most unsatisfactory force. At first neutral as well as belligerent subjects were allowed to cruise against commerce, and privateering became a lucrative occupation for the lawless and adventurous spirits who abounded among sea-faring populations. The scandal grew so great, as modern trade developed, that in the eighteenth century most of the states of Europe passed laws for the

punishment of any of their subjects who took Letters of Marque authorizing depredations upon the commerce of any power with which they were at peace. In the United States similar provisions were placed upon the Statute Book by Congress in 1797 and 1816. The result of legislative acts such as these, joined with the higher moral standard of which they were at once the symptom and the effect, was to bring to an end privateering by neutrals. But there still remained the use as commerce destroyers of private vessels belonging to belligerent subjects and fitted out by them for purposes of personal enrichment.

In Europe opinion turned against these more defensible privateers, and, though they were freely used in the great struggle between England and Revolutionary and Imperialist France, great seamen denounced them, and charged them with hoisting whatever colors were necessary to effect the capture of any merchantmen that came in their way.[1] At the commencement of the Crimean War in 1854 England and France notified their determination to rely upon public armed ships alone, and not to issue Letters of Marque to private individuals. During the conflict both sides refrained from authorizing private vessels to cruise against commerce, and at its close the abolition of privateering was decreed by the first article of the Declaration of Paris. Meanwhile in America opinion was divided, the prevailing tendency being to look on privateers as a cheap method of defence for a power which possessed a large sea-borne commerce and a small navy, which was the condition of the United States at that time. They therefore declined to sign the Declaration unless it included the further reform of exempting innocent private property at sea from belligerent capture.[2] The question was allowed to drop, and American assent was withheld from the Declaration. But privateers were not used in the fierce struggle with the seceding South, or in the war of 1898 with Spain. Indeed, none have been sent forth to prey on sea-borne trade in any of the wars which have taken place between civilized nations since 1856. It can hardly be doubted that no more will be

[1] Napier, *Peninsular War*, vol. iv, appendix, p. 497. [2] See § 193.

heard of them in future maritime conflicts. Enlightened opinion condemns them, and the interests of commerce are opposed to their continued existence. The powers that still decline to sign the Declaration of Paris may possibly have escaped the technical obligation to refrain from using them, though even this is doubtful, since universal observance for more than sixty years can be pleaded in favor of the rule of prohibition. But these states are not likely to run counter to the general sense of the civilized world, and bring down upon themselves as belligerents the ill-will of all neutral powers who possess a sea-borne trade. And even if they were willing to take the risk, the cost of an effective cruiser is now so enormous that few private individuals would be able to meet it.

§ 201

Our next heading in connection with the instruments and methods of warfare is

*A Volunteer Navy.*

A Volunteer Navy.

This is a new product of creative ingenuity, and it can best be explained by a brief account of the circumstances that first brought it before the world. In July, 1870, at the beginning of the great war between France and Germany, Prussia endeavored to make up for the weakness of its state navy by utilizing its merchant ships for warlike purposes under special conditions. The patriotism of seamen and ship-owners was appealed to, and they were invited to place themselves and their vessels at the service of the Fatherland.[1] The Volunteer Navy to be thus formed was to carry the German flag, and was to be under naval command and naval discipline. The officers were to receive commissions from the state for the period of the war, and the crews were in like manner to be temporarily enrolled in the government service. The owners were to receive a certain sum as hire, and to be compensated if the vessels were destroyed while under the control of the naval authorities. If prizes were taken, the sailors who took part in the capture were to be rewarded by

[1] Dupuis, *La Guerre Maritime*, § 48.

money payments. These offers and appeals do not seem to have been very enthusiastically received by the seamen and traders of Germany, for throughout the war no ship of the proposed Volunteer Navy ever put to sea.[1] But outside the Fatherland the plan attracted a good deal of attention. The French Government denounced it as a disguised form of privateering and a gross violation of the Declaration of Paris. The British Ministry, when called upon to say how they would regard it, published an opinion of the Law Officers of the Crown, who had come to the cautious conclusion that there was "a substantial difference" between it and the system against which the first article of the Declaration of 1856 was directed, and declared that they could not object to the Prussian Decree.[2] Many publicists of repute discussed the matter, but no general agreement was reached. Calvo and Hall condemned the proposal,[3] but Bluntschli, Twiss, and Geffcken saw no serious objection to it on the score of legality.[4]

The question raised in 1870 was not settled by the collapse of the Prussian project. Soon a movement began in naval affairs similar to that whereby militia and volunteer corps gradually won recognition in land warfare. In the winter of 1877–1878, when there was imminent danger of hostilities between England and Russia, the latter power accepted the offer of a patriotic association to create a Volunteer Fleet, the vessels of which were to be purchased by private subscription, but made over to state control during the contemplated war, and commanded by officers of the imperial navy. Fortunately, the questions at issue were settled by the Treaty of Berlin; but the Russian Volunteer Fleet survived the circumstances that gave it birth. It received an annual subsidy from the government on certain conditions as to the number and efficiency

[1] Moore, *International Law Digest*, vol. VII, pp. 540, 541.

[2] British Parliamentary Papers, *Franco-German War*, No. 1 (1871), p. 22.

[3] Calvo, *Droit International*, § 2086 [Reference apparently to edition current in 1884. Untraceable in edition of 1896]; Hall, *International Law*, 7th ed., § 181.

[4] Bluntschli, Article in *Revue de Droit International*, vol. IX, p. 552; Twiss, *Belligerent Right on the High Seas since the Declaration of Paris*, pp. 12–14; Geffcken, Note to Heffter, *Droit International de L'Europe*, p. 279.

of the cruisers, and its ships were regularly employed in carrying government stores, convicts, exiles, troops, and officials between St. Petersburg or Odessa and Vladivostock. The Minister of Marine appointed their commanders, who might be naval officers on active service. Their crews also might be supplied by the imperial navy. In time of war the vessels of the Volunteer Fleet might be transferred to the naval or military departments by administrative order.[1] It is difficult to resist the conclusion that they were "properly to be considered as already belonging to the imperial navy."[2] Great Britain and America have adopted a somewhat different system. The former led the way in 1887 by entering into agreements with the Cunard Line, the White Star Line, and other great steamship companies, whereby, on consideration of an annual subsidy, they agreed to sell or let certain swift vessels to the government at a fixed price and on short notice, and to build new ships according to plans to be approved by the Admiralty, who were to be at liberty to acquire them on terms similar to those accepted in the case of the existing fleet. Half the seamen on board the vessels subject to these agreements were to be engaged from the Royal Naval Reserve, and the Admiralty was to have the right of placing on board fittings and other arrangements which would facilitate the speedy equipment of the vessels as cruisers in the event of war.[3] In 1891 the government of the United States acquired powers of a like kind over the vessels of the American Line, and in 1898 some of them were taken over and did good service during the war with Spain.[4] There is nothing in these agreements to which the most scrupulous legalist can object; and the same may be said of the systems adopted by France, Japan, and other naval powers, and also of the more recent British plan of subsidizing a great shipping company to build according to Admiralty designs on the understanding that the vessels so constructed

[1] *Constitution of the Volunteer Fleet.*

[2] Hall, *International Law*, 7th ed., § 181.

[3] British Parliamentary Papers, *Subvention of Merchant Steamers for State Purposes, 1887.*

[4] Moore, *International Law Digest*, vol. VII, pp. 542, 543.

will be taken over in time of war. The legality of a Volunteer Navy must depend, like the legality of a Volunteer Army, upon the closeness of its connection with the state, and the securities it affords for a due observance of the laws of war.

§ 202

After considering the questions arising out of a volunteer navy we turn naturally to those which are connected with

*Converted Merchantmen.*

We have just seen that it is lawful in time of peace to designate and to some extent to prepare private vessels for war-like uses, if when they take part in hostilities they act under state authority and control. Converted merchantmen And there has never been any doubt as to the right of a belligerent government to commission merchantmen as men-of-war under certain conditions. We have now, therefore, to determine what formalities are necessary in order to effect the change, and where they may be performed. There is agreement as to the first matter, but serious dissension as to the second. The Hague Conference of 1907 discussed it in vain; and it was one of the two important questions in the programme of the Naval Conference of 1908–1909 which that assembly failed to solve.

Let us begin with the points of agreement. They are embodied in the Seventh Hague Convention of 1907, which lays down that converted merchantmen do not possess the rights and duties of warships unless they are placed under the authority, control, and responsibility of the power whose flag they fly. In addition they must bear the external marks of the warships of their nationality, their commanders must be duly commissioned officers in the service of the state, with their names inscribed in the navy lists, their crews must be subject to naval discipline, and they must observe in their operations the laws and customs of war. Moreover, "a belligerent who converts a merchant ship into a war-ship must, as soon as possible, announce such conversion in the list of the

ships of its war fleet."[1] It is a gain to have secured these regulations, though they do not deal with the most important question of all, the locality where conversion may be effected.[2] The United States was so acutely conscious of this defect that it refused to sign the Convention.[3]

We now pass on to the point of acute difference. It came into prominence during the Russo-Japanese War, owing to the action of the *Peterburg* and the *Smolensk*, two vessels of the Russian Volunteer Fleet. Early in July, 1904, they passed the Bosphorus and the Dardanelles as merchant vessels. Had they been regarded as warships, their passage would have been prohibited by the Treaty of London of 1871 [which was then in force],[4] signed by the six Great Powers of Europe, and Turkey. As merchantmen they crossed the Mediterranean and went through the Suez Canal. Soon after entering the Red Sea they threw off the mercantile character, mounted guns which had hitherto been concealed in their holds, and in the capacity of warships proceeded to cruise against neutral commerce. On July 13 the *Peterburg* captured the British steamer, *Malacca*, and sent her back through the canal for trial in the Baltic port of Libau. The British Government demanded her release, on the ground that her captor had gained access to the open seas of the globe as a merchantman, and was, therefore, legally estopped from acting as a ship of war. If she was a belligerent cruiser, her proper place was the Black Sea; and if she were a merchantman, she had no right to make captures anywhere. In either case the seizure of a vessel in the Red Sea was illegal. After a short period of active negotiation the *Malacca* was released, and it was agreed that the *Peterburg* and the *Smolensk* should no longer act as cruisers.[5] But the incident caused the question of conversion to be de-

[1] Higgins, *The Hague Peace Conferences*, p. 309; Scott, *The Hague Peace Conferences*, vol. II, pp. 422–425; Whittuck, *International Documents*, pp. 157, 258; *Supplement to the American Journal of International Law*, vol. II, Nos. 1 and 2, pp. 134, 135.

[2] *Preamble of Seventh Hague Convention of 1907.*

[3] Scott, *The Hague Peace Conferences*, vol. I, pp. 574, 575.

[4] [See § 89.]

[5] Lawrence, *War and Neutrality in the Far East*, 2d ed., pp. 202–216.

bated at the second Hague Conference, disengaged from the special circumstances that were mingled with it in 1904.

Great Britain, backed by the United States, Japan, and other powers, took the ground that a state could change its merchantmen into warships only in its national ports, to which were afterwards added ports under the occupation of its armed forces. A group of powers, headed by Russia and Germany, claimed liberty of conversion on the high seas, and there were some which were prepared to accord it even in neutral ports. No rule had been laid down previously, and no precedents were discovered. It was preëminently a case for international legislation, and such unfortunately it still remains. Arguing on general principles it seems impossible to deny that a belligerent would commit a gross violation of neutrality, if it presumed to set forth one of its merchantmen as a man-of-war in neutral territorial waters. Conversely a neutral that allowed such a high act of sovereignty to be performed by a belligerent within its waters would render itself liable to reclamations from the other party, which might suffer great loss from its weakness, carelessness, or partiality. At the end of the eighteenth century it was admitted that the establishment of belligerent prize courts in neutral ports was a grievous offence; [1] and it cannot surely be contended at the beginning of the twentieth century that the commissioning of belligerent warships therein is anything less. On the other hand, the principle of territorial sovereignty allows every state to turn into fighting ships whatever members of its own mercantile marine it pleases, in its own ports and waters. The same principle would justify the mutual grant by allies in a war of liberty of conversion in each other's ports; and the legal powers of a military occupant are so great in things relating to the war that they may be taken to include a right of converting in all territorial waters that he controls fully and continuously by force of his arms. All this would probably be conceded by important maritime powers. But a region of serious contention is entered when we come to consider conversion on the high seas.

[1] See § 188.

The question cannot be settled by any clear deduction from admitted principles. On the high seas states habitually exercise powers of sovereignty over their vessels, both public and private, and over the persons and things within them. And certainly the powers of sovereignty include the right to turn a merchantman into a man-of-war, or a man-of-war into a merchantman. But they also include the right to set up a prize court; and yet belligerents are not allowed to do anything of the kind in the cabins of their cruisers. It may well be argued that by parity of reasoning they cannot be allowed to change the character of their vessels. In answer to this it would be said that the conversion of a merchantman taken from the enemy into a vessel of war, by putting on board an officer and crew from the captor's complement, is acknowledged as lawful, and has been done frequently by maritime belligerents. Why then, it might be asked, can they not turn their own merchantmen into cruisers on the open sea? And why may they not go a little further, and send their merchantmen to sea in such a condition that they can convert themselves when they come to a convenient spot?

It is impossible to give a decided answer to these questions as long as we confine ourselves to general reasoning. We must base our conclusions on a study of the consequences of unrestricted conversion. We shall find that the advantages are confined to belligerents, and among them to those who possess a considerable mercantile marine and but few ports of their own in distant parts of the world. It would be convenient for them to be able to place their commerce destroyers in the midst of a distant hunting ground, by sending them to sea as merchantmen, obtaining for them as such the hospitality of neutral ports, and ordering them to change themselves into warships when they were safely established on a great trading route of the enemy. But states with few vessels capable of being converted, and states with many ports in distant seas, would find the process impossible or useless. The disadvantages would be felt by all neutrals interested in sea-borne commerce, and by all belligerents whose mercantile marine spread itself over a wide area of ocean in its trading operations.

Neutrals would be placed in a specially unfavorable position. For not only would they find their trade harried by vessels which were deemed to be peaceful merchantmen till they began warlike operations, but they would also be subject to the complaints and threats of belligerents whose ships were attacked by cruisers which just before had received in their ports facilities not accorded to warships. Indeed, they themselves might suffer in this way; for there would be nothing to prevent a potential cruiser from obtaining a refit and full supplies of coal in a neutral port, and then turning itself into a warship as soon as it had passed out of territorial waters, and making prize of a vessel of the neutral whose hospitality it had just received. However guilty the vessel in question might turn out to be, a rankling feeling of injustice could not fail to arise over her capture. Nothing more calculated to make difficulties between neutrals and belligerents could well be imagined than the liberty of unrestricted conversion that some of the powers contend for; while the advantages to themselves would be more apparent than real, for a *guerre de course* is rarely decisive.

On the other hand, Great Britain and her supporters are inconsistent when they object to the transformation at sea of belligerent merchantmen into belligerent warships, and at the same time desire to retain the liberty of turning their prizes taken from an enemy into warships on the spot. A state's own merchantmen and the merchantmen of its enemy should be treated alike in this connection. The principle of convertibility or the principle of inconvertibility should be adopted, but whichever is chosen should be applied all round. We have already seen reason to lean to the side of the latter, and the arguments in favor of it become overwhelming when we reflect that conversion implies reconversion. The existence of a race of maritime hermaphrodites, which can be men-of-war when a capture is to be made and vessels of commerce when shelter and supply are required in neutral ports, is foreign to all ideas of honorable warfare. Moreover, it would be full of danger to the peace and security of neutrals. They are already more than sufficiently injured and annoyed by the rights over their commerce conferred on belligerents. Why

should they be made to bear a further burden in quarrels that are not their own? It would, of course, be possible, while allowing conversion, to forbid reconversion in the same war, as was suggested by Austria at the Hague in 1907. This, and the Italian proposal to confine the right of conversion to merchant ships that left the territorial waters of their own state before the outbreak of hostilities, might have made a workable compromise. Another was suggested by Great Britain, when her delegates at the Naval Conference of 1908–1909 were instructed that "difficulties might be met by restricting the right of conversion on the high seas to the case of vessels which had been specifically and publicly designated by the respective governments as suitable for the purpose and borne on their navy lists; and by subjecting such vessels, while in neutral ports, to the same treatment as belligerent men-of-war."[1] But no proposal was able to secure agreement. [The great war saw the frequent use of converted merchantmen, and on its outbreak Great Britain at once definitely stated her intent to put in practice the view which she had previously maintained. Knowing that Germany would probably attempt to get her merchant ships out of the then neutral ports of the United States and then convert them into warships on the high seas, the British Government notified the United States Government that it would be held responsible for any dangers to British trade or shipping which might be caused by such vessels. The United States returned a cautious answer which did not commit them either way.] [2]

[1] British Parliamentary Papers, *Miscellaneous*, No. 4 (1909), p. 31. For valuable commentaries on the questions raised in this section, see Higgins, *The Hague Peace Conferences*, pp. 312–321; and Scott, *The Hague Peace Conferences*, vol. I, pp. 568–576. For a reasoned statement of the case for conversion, see Dupuis, *Le Droit de la Guerre Maritime d'Après les Conférences de la Haye et de Londres*, ch. III.

[2] [Garner, *International Law and the World War*, vol. I, § 245. Cf. *American Journal of International Law* (1915). *Official Documents*, pp. 121–122.]

§ 203

The next subject for attention is the important one of

*Submarine mines.*

Submarine mines.

Mines have been used on land since the invention of explosives. We have more or less obscure notices of something resembling them at sea in mediaeval times, such as the Greek fire and "serpents" on board the Saracen dromond destroyed by Richard I off Beyrout.[1] But submarine mines properly so called were not adopted as a regular means of defence till the American Civil War, when the Southerners destroyed some of the blockading Northern ships by means of them. Attention was thus directed to them as terribly efficient instruments of warfare; and of late years much inventive ingenuity and scientific knowledge have been applied to the task of developing their destructive qualities. In the Russo-Japanese War of 1904–1905 both belligerents used submarine mines on a large scale, and the results showed that innocent neutrals might suffer from them to a hitherto unsuspected extent. It was, therefore, highly desirable that the Hague Conference of 1907 should regulate the use of the new weapon. It toiled long at the attempt; but the result is one of the least satisfactory pieces of its work. In the preamble of the Convention which dealt with the subject it declared itself "inspired by the principle of the freedom of the seas as the common highway of all nations," and set forth as its aims the mitigation of the severity of war and the protection of peaceful commerce. But it seemed conscious of a failure to attain these exalted objects; for it spoke of the rules it laid down as provisional, and decreed that the contracting powers should reopen the question in six years and a half, unless by that time it had been already settled by a third Hague Conference.[2]

[1] *Itinerarium Ricardi*, bk. II, ch. 42.

[2] *Eighth Hague Convention of 1907*, Preamble and Articles 11, 12. The text of the Convention can be found in Higgins, *The Hague Peace Conferences*, pp. 322–327; Whittuck, *International Documents*, pp. 161–166; Scott, *The Hague Peace Conferences*, vol. II, pp. 429–437; *Supplement to the American Journal of International Law*, vol. II, Nos. 1 and 2, pp. 138–145.

Submarine mines are of two distinct sorts. The first are called observation mines. They are fired by an operator on shore, who touches a button and frees an electric current when he sees an enemy's warship in the act of crossing the mine field. They require no special regulation, as they are easily kept under control and when properly managed cannot harm neutral shipping. But maritime states are giving them up, as being at once expensive and incapable of being worked at a considerable distance from land. The other kind are in no way connected with the shore. They are described as mechanical mines, or automatic submarine contact mines. Their peculiarity is that when struck with considerable force they explode through some internal action. They may be anchored to the bottom and adjusted to any required depth below the surface, or they may be dropped into the water without fastenings of any kind and allowed to drift wheresoever the winds and waves take them.

The Convention of 1907 forbids the use of unanchored automatic contact mines "unless they are so constructed as to become harmless one hour at most after the person who laid them has ceased to control them." Anchored automatic contact mines are allowed when they "become harmless as soon as they have broken loose from their moorings." In addition the use of torpedoes is confined to those that cease to be injurious "when they have missed their mark." [1] This is the only mention of these latter instruments in the Convention, and we shall not refer to them again, except by way of illustration. The Conference established no restrictions as to the places where mines may be laid; but the common law of nations does in effect forbid belligerents to make use of them in neutral waters, by prohibiting warlike operations therein. As things stand at present the hostile parties may strew them over the high seas and sow them broadcast in their own territorial waters and those of their foes. The Convention imposes but one restraint, and that is illusory. It declares that "the laying of automatic contact mines off the coasts and ports of the enemy with the sole object of

[1] See Article 1.

intercepting commercial shipping is forbidden." [1] But a naval commander can always allege some other object, and by this means secure unrestricted liberty to close a commercial port by mines laid secretly under cover of night or fog. The port would be practically blockaded by unseen instruments of destruction, and death would be the penalty of an unsuccessful attempt to enter it. It might well happen that the first victims were the passengers and crew of a neutral liner which was making for the accustomed terminus of her voyage in ignorance that it was no longer open. Such a catastrophe would horrify the civilized world. But the authors of it could claim that they were within the terms of the Convention, if they were able to show that the port contained a warship, however weak and antiquated, whose exit it was desirable to prevent, or that there was any danger, however remote, of the entry of an enemy cruiser. Thus a new and horrible form of blockade might be foisted into naval warfare, just at the time when the old blockade by means of ships was being placed under mild and humane international regulations.[2]

But this case does not stand alone. The Convention abounds with loopholes. We have seen that unanchored mines may be used if they become harmless within an hour after escaping from the control of the person who laid them. Does control exist when a string of mines is attached to the free end of a tow rope several miles in length? If so, it does not mean power to regulate movement and prevent injury to innocent vessels. The simple requirement of harmlessness within an hour of being placed in the water would have been much more efficacious. Again, when anchored mines cease to be under observation the belligerent who laid them must notify the danger zones by means of a warning to mariners which must also be communicated diplomatically to governments—an excellent rule, but deprived of nine-tenths of its force by the saving clause "as soon as military exigencies will permit," [3] which means in effect after the mines have done their deadly work on some one, whether combatant or non-combatant, belligerent or

[1] See Article 2. [2] See part IV, ch. v. [3] See Article 3.

neutral, apparently does not matter much. Worst of all is the permission granted inferentially to backward or careless powers to continue to use mines that are incapable of becoming harmless as soon as they get loose from their moorings or after they have been immersed for an hour. All the Convention provides is that such instruments of death shall be made to satisfy the prescribed conditions "as soon as possible." [1] This may mean in some cases indefinite delay. The grant of a fixed period for the conversion of mines would have been infinitely preferable, if it proved impossible to obtain an unqualified prohibition. The Convention was passed at last by a Conference utterly weary of ineffective attempts to deal with the subject; and it bears marks at every turn of the series of compromises that gradually whittled away the strength of the original proposals.[2] The human race must make up its mind whether it is made for war with peace as an occasional breathing-space, or for peace with war as an unfortunate interruption tolerated only because it settles important questions that cannot otherwise be disposed of. If war is paramount, the Convention may stand with all its obvious sacrifices of neutral safety to belligerent exigencies. If not, drastic alterations are required in it,[3] as its authors more than suspected.

The Institute of International Law has discussed the question several times since the second Hague Conference sat. In 1911 at Madrid it decided against the closure of an enemy's ports by mines alone. In 1908 at Florence, and in 1910 at Paris, [and again in 1913 at Oxford in its Manual of the Laws of Maritime Warfare [4]] it agreed on the prohibition of both anchored and drifting mines on the high seas. This is the only formula of safety for neutrals in oceanic voyages. The waters that are a scene of conflict at one moment are a highway of peaceful passage the next. No precautions can make sure that every floating mine put into the waves during an engage-

[1] See Article 6. [2] Higgins, *The Hague Peace Conferences*, pp. 328–345.

[3] Article by Professor de Lapradelle in the *Revue des Deux Mondes*, July, 1908, p. 683; Scott, *The Hague Peace Conferences*, vol. I, pp. 576–587; Dupuis, *Le Droit de la Guerre Maritime*, pp. 581–596.

[4] [*Annuaire* (1912), vol. xxv, pp. 86–88: vol. xxvi, pp. 40, 227.]

ment becomes innocuous soon after, and no rules can secure the universal observance of precautions in the excitement of a battle. Anchored mines placed in shoal water to protect a stationary fleet or block a channel remain as engines of death after the fleet has departed. When a particular use of the high seas for war renders them dangerous for purposes of peaceful intercourse, and there are no outward indications of the peril to warn off innocent passers-by, the warlike use should be forbidden in the interest of humanity. The territorial waters of belligerents require different treatment; but combatants ought to be forbidden to use in them means of destruction that may take effect outside without giving warning of their presence. This involves the prohibition of unanchored mines, since the experience of the Russo-Japanese War shows that they may drift out to sea by hundreds and destroy neutral life and property at a great distance from the scene of conflict.[1] The loss of their noxious properties after immersion for a given time cannot be guaranteed in every case, and if only a few exploded against the sides of neutral vessels the results could be deplorable. Anchored mines can without difficulty be constructed so as to become harmless as soon as they have broken adrift from their moorings. But there is no security that they will not drag their anchors; and the danger that this should happen unobserved is considerable when such mines are laid along a coast-line which is not constantly watched because it is free at the moment from active operations. It would, therefore, be wise to prohibit the use of anchored mines in the territorial waters of the belligerents, except for the attack and defence of fortified places, and in such cases they need not be confined strictly to territorial waters, but might be allowed within the zone of active operations. The presence of the opposing forces would constitute ample warning to neutral vessels. Any of them that approached the lines of the combatants would do so at their peril, just as much as if they attempted to steam between the squadrons of a fleet in action.

[1] Lawrence, *International Problems and Hague Conferences*, p. 176; *La Deuxième Conference Internationale de la Paix*, vol. III, p. 663.

If the prohibitions just suggested were adopted, the question of the use of mines in blockades would be incidentally solved. Ordinary commercial blockades would be confined, as before, to ships; but in strategic blockades, when the reduction of the place blockaded was the ultimate object of the blockaders, anchored mines would be allowed within the zone of action of the blockading force. The case of narrow straits connecting two open seas remains to be considered. On the general principle of freedom of navigation for peaceful vessels, no mines should be allowed in them, even when all their waters are territorial, for none could be laid without the most imminent danger to passing craft. On the other hand, it seems impossible to forbid a belligerent to defend with anchored mines an important port situated, like Constantinople, on the shore of one of these straits. Perhaps it would be best to leave such places to the operation of the suggested rule which allows the use of anchored mines in the attack and defence of fortified coast towns, but to prohibit any further use of mines in the straits in question.

It is highly desirable that neutrals should be forbidden to block with mines the straits under their control which are passages between open seas. But should the prohibition apply to all neutral waters? The Convention of 1907 answers the question in the negative, stipulating only for the precautions imposed on belligerents and for previous notice to mariners of the places where the mines have been laid.[1] It would be much simpler to declare them illegal in every case. The smaller states regard them as a cheap defence against possible aggression from a strong and unscrupulous belligerent. But their safety and independence really rest on moral considerations, and not on force. Against casual violations of their neutrality by subordinate commanders, torpedoes and submarines would be a more efficient protection than mines, and not vastly more expensive when the cost of possible compensations comes to be reckoned. Neutrals would lose little or nothing in the way of material security if they were denied the right to use mechanical mines in their ports and waters, while the cause of humanity, which is a direct interest of all states, would gain much.

[1] See Article 4.

The process of reasoning we have just been through would give us a very simple set of regulations. They may be summed up in a sentence. No mines of any kind on the high seas, except when active operations against a fortified port extend beyond marginal waters; no drifting mines anywhere; no anchored mines except in attack or defence of a stronghold situated on the shore, and then all such mines to be so made as to become harmless the moment they break adrift.[1] But these rules must be held to apply to existing circumstances only. If, as does not seem altogether improbable, mines are rendered dirigible from a distance by invisible and impalpable forces, they will no longer be indiscriminate in their action, but will have become projectiles directed by the will of man. In that case the only rule required for them will be that which is already in force as regards torpedoes. They must become harmless when they have missed their mark. [The great war demonstrated to a nicety the complete futility of existing rules as to mine-laying. The Germans sowed unanchored mines broadcast over the high seas, and were quite indifferent as to whether they exploded beneath an enemy or a neutral vessel. Heavy losses to life and shipping ensued in consequence. As a counter-measure the British turned certain areas of the high seas into mine-fields, but left lanes through them which could be safely navigated by neutrals with proper sailing instructions; nor was a single neutral ship mined which observed these precautions. There were however neutral protests not only against the German policy, but also against the British, and it is impossible not to appreciate their force. For though neutral ships ran no risk of destruction from travelling over the British mine-fields as they did over the German, yet the necessary deviation from their direct course always entailed expensive delay. In fact a mined area on the high seas is simply a broad and deadly barrier on an international highway making neutrality almost as intolerable as war.][2]

[1] [Cf. the rules proposed by the *Institut de Droit International*. *Annuaire* (1913) vol. xxvi, pp. 40, 227.]

[2] [Garner, *International Law and the World War*, vol. i ch. xiv. Fauchille, *Droit International Public*, vol. ii §§ 1316²–1316¹⁰.]

§ 203 *a*

[It is convenient here to add a section on

*Submarines.*

The submarine is not as such an unlawful weapon at all, but the particular mode in which it is used may make it so. It operates most effectively not by the light guns which it mounts but by the discharge of torpedoes. Torpedoes at one time had their share of the execration which nearly always greets a new weapon of warfare.[1] But long before the great war they had outlived this unpopularity, and there is now no doubt as to their legality. We can say at once that it is perfectly lawful for a submarine to sink the warships of its enemy without any notice whatever. Indeed the mere giving of notice would ensure its own destruction by gunfire or ramming. Further, it is equally lawful for submarines to visit, search, and capture enemy vessels, or, if they engage in contraband trading, blockade running, or unneutral service, neutral ships. They can also sink enemy merchant ships in the rare circumstances of necessity which we have discussed elsewhere, and neutral merchant ships subject to still more stringent conditions.[2] But whether they visit, search, capture, or destroy, they are in precisely the same legal position as surface warships. They have no greater rights; they are bound by no less duties. One fundamental duty in visit and search is notification of the presence of the visiting vessel by a signal to the suspected vessel to heave to. And an equally fundamental duty before sinking a vessel (where it is permissible at all) is to remove the passengers, crew, and ship papers in safety. Both these duties were notoriously violated during the great war by the German submarine commanders, not merely in isolated cases, but as part of a deliberate policy ordered by the German Government. There was not any pretence of conforming to the rules of visit and search. The practice was simplicity

[1] [Maine, *International Law*, p. 141.]

[2] [See § 191, and query as to the effect of the prohibition of submarines as "commerce destroyers" at the Washington conference quoted p. 518 below.]

itself, — to sink all vessels at sight. The attendant loss of life and suffering were very great. The destruction of the giant British liner, the *Lusitania,* without a moment's warning and with a loss of 1200 lives, including 115 neutral American citizens, stands out as probably the starkest outrage committed by Germany during the war. Yet it was but one among hundreds of similar atrocities, unknown and unnumbered by the general public simply because of their multitude. Not a single valid excuse was pleaded by the Germans. One was that the submarine, being a new weapon, required an alteration in the laws of naval warfare which would cover all the uses to which it might be put. But this ignored the elementary principle that a new weapon is only allowable if it neither injures innocent people nor causes disproportionate suffering to combatants. The modern rifle does infinitely more damage to an enemy than the cross-bow, but no one has ever attempted to deny its legality as a new weapon on the one hand, or to justify its use for shooting harmless non-combatants or for firing explosive bullets against civilized troops on the other. Another argument was that the fragility of the submarine and its slowness in movement made it too dangerous for it to comply with the usual rules as to visit and search. It might just as well be argued that because you cannot use the rack and thumb-screw without causing unnecessary suffering they therefore become lawful instruments of punishment. Human beings were not created as targets for experiments in cruelty. Another contention was that if merchant ships would cease to arm themselves defensively, the submarine could operate without breaking the laws of war. But no state, except Germany, seriously contests the legality of arming merchant ships defensively.

The fact is that the submarine as used by the German navy was inherently incapable of observing the laws of war without making its own destruction highly probable. If it gave any notice of its presence, it might be sunk at once by a single lucky shot. If it stood by to rescue survivors of the vessel destroyed, it courted destruction by enemy ships in the neighborhood. It had no accommodation for any crew except

its own, and no spare men to put on board a captured vessel as a prize crew. What then is the future of the submarine? Two points seem to be perfectly clear. The first is that the submarine has come to stay. The second is that, as used by the Germans against merchant shipping in the great war, it is and always will be unlawful, unless the principles on which International Law has been based since Grotius are to be thrown aside. If the submarine cannot comply with the rules that govern surface warships in visit, search, and capture, then it cannot be used for those purposes. But no state that wishes to retain this type of ship — and the Washington Conference of 1921–1922 showed no unanimous desire to abandon it — need be despondent. For it is quite possible to construct submarines of a size which will enable them to obey the laws of warfare. Rear-Admiral S. S. Hall has said of such vessels, "There is no question as to the capacity of a submarine cruiser to carry prize crews, take a considerable number of prisoners, and in every way comply with the law in her operations, if she is designed for it. The type is not much developed yet, and not generally known, but it soon will be, and there will then be no shadow of an excuse such as Germany made for torpedoing ships without warning." [1] The considerations which we have suggested above tally with the treaty between the United States, the British Empire, France, Italy, and Japan, signed on February 6, 1922, at Washington, as one of the results of the successful Conference held there. It provides that belligerent submarines are not under any circumstances exempt from the universal rules as to visit and search, and that if a submarine cannot capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and seizure and to permit the vessel to proceed unmolested. And the signatory powers invite all other civilized powers to express their consent to this statement

[1] [*Grotius Society*, vol. v (1920), pp. 86-87. See also generally Perrinjaquet in *Revue Générale de Droit International*, vol. xxiii (1916), pp. 117–203, 394–423; vol. xxiv (1917), pp. 137–243, 365–436. Garner, *International Law and the World War*, vol. i, ch. xv. R. F. Roxburgh in *British Year Book of International Law* (1922–1923), pp. 150–158. Pearce Higgins, *Ibid.* (1920–1921), pp. 149–165; and *Defensively-armed Merchant Ships* (1917).]

of the established law, so that there may be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents. Nor had the signatory powers the least hesitation in fixing a stern punishment for infraction of the rules which they declared to be law, for they declared that any person in the service of any power who shall violate them, whether under orders or not, shall be liable as for an act of piracy and triable by the civil or military authorites of any power within the jurisdiction of which he may be found. And these provisions are rounded off with an Article which may well be quoted *in extenso*. "The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914–1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and non-combatants; and to the end that the prohibition of the use of submarines as commerce destroyers shall be universally accepted as a part of the law of nations, they now accept that prohibition as henceforth binding as between themselves, and they invite all other nations to adhere thereto." When it is recollected who the signatory powers were, it is impossible to overrate the importance of this agreement. True, it binds only those powers, but considering the gigantic naval superiority that they aggregate, one can scarcely imagine any other power imitating Germany's example in a future war, and running the risk of having its submarines, which break the laws of war, hunted down and captured or sunk as pirates.][1]

§ 204

We must now concentrate our attention on

*Bombardments.*

They have been referred to briefly before in connection with armies.[2] Here we must speak of them at greater length with reference first to war on land, secondly, to war at sea [and

[1] [*Parliamentary Papers, Miscellaneous No. 1 (1922)*. Cmd. 1627, p. 19.]

[2] See § 168.

thirdly, to war in the air]. As artillery developed while the world grew less barbarous, the terrible sufferings caused to non-combatants, and especially to women and children, by a rain of explosive shells rendered humane commanders averse from this means of destruction except against fortifications or troops. But all commanders were not humane; and it was felt that, instead of leaving individuals free to act as they pleased, the laws of war should impose restraints which could not be disregarded without certain dishonor and possible punishment. The Brussels Conference of 1874 laid down in its draft regulations that "towns, agglomerations of houses or villages, which are open and undefended, cannot be attacked or bombarded." It permitted bombardment when they were defended, but laid on the hostile commander the duty of warning the authorities of the place beforehand, unless he contemplated an assault. The besieged were to indicate by special signs the "buildings devoted to religion, arts, sciences, and charity, hospitals and places where sick and wounded are collected," and when this was done they were to be spared as far as possible on condition that they were not used for military purposes.[1] These rules were adopted by the Hague Conference of 1899, and made part of its Regulations concerning the Laws and Customs of War on Land.[2] The Conference of 1907 introduced the phrase "by any means whatever" into the clause prohibiting the bombardment of undefended habitations, for the express purpose of preventing the discharge of projectiles from balloons on open towns and hamlets. It also added historic monuments to the list of things against which artillery is not to be directed. In their final form these Articles are now part of the war law of the civilized world.[3] Practice has sometimes gone beyond them in recent years. In 1899 the Boer General, Joubert, agreed not to fire on the Intombi Camp, a place at a

Bombardments.

[1] British Parliamentary Papers, *Miscellaneous*, No. 1 (1875), p. 321.

[2] See Articles 25–27.

[3] Higgins, *The Hague Peace Conferences*, pp. 237, 270; Whittuck, *International Documents*, pp. 135, 136; Scott, *The Hague Peace Conferences*, vol. II, pp. 388–391; *Supplement to the American Journal of International Law*, vol. II, pp. 107, 108.

little distance from beseiged Ladysmith, but within the perimeter of the defending lines. Thither the sick and wounded were sent, and also women and children. They helped to consume the stores of the town, but were safe from the shells of the investing forces.[1] Sometimes non-combatants have been allowed to pass through the lines of the besiegers; but usage is not uniform, and therefore no rule can be founded on it. The Germans, for instance, in their invasion of France in 1870 both permitted and refused departure according to circumstances. They allowed it at Strasburg which they were determined to carry by assault, if necessary, and they refused it at Paris which they meant to reduce by strict investment and slow starvation. [There are considerable uncertainties in the interpretation of the Hague Convention on land bombardments. No agreement exists as to what constitutes an "undefended" place. The question became acute during the great war when the Germans were repeatedly accused of shelling undefended towns, and they in turn made similar charges against the *entente* powers. "Undefended" is certainly not equivalent to "unfortified," for a place may well be the one without being the other. A modern town is not defended merely because it includes an ancient Roman camp or a ruinous mediaeval fortress. Again, if a town has the means of defence, but does not use them, it would seem that it must not be bombarded, for though it is capable of being defended, yet it is actually undefended. At least this is the better interpretation of the somewhat ambiguous phrase "qui ne soit pas défendus," in Article 25 of the Hague Convention of 1907.[2] On principle it would appear that the mere presence of troops in a town ought not to make it "defended," if the test be, "Does the town intend to defend itself?" But practice is markedly divergent on this point. And the German view is that the existence of military supplies, railways, telegraphs, or bridges, in a town make it "defended." If this be so, there are not many villages and towns in a modern state that are undefended, and the

[1] Conan Doyle, *The Great Boer War*, ch. xiii.

[2] [*Annuaire de l'Institut de Droit International* (1913) vol. xxvi, pp. 533–534.]

Convention was scarcely worth drafting. If a place be fortified, the enemy's guns should, as far as possible be trained only on the fortifications, but any artillery officer knows that this is often impracticable. Yet there is too much reason to believe that German gunners injured or destroyed many historic monuments deliberately and not accidentally.] [1]

At the Hague Conference of 1899 no agreement was reached on the question of naval bombardments. The plenipotentiaries were obliged to rest content with the expression of a wish, inserted in their Final Act, that the matter should be "referred to a subsequent Conference for consideration." [2] The points at issue were connected with various barbarous proposals to destroy the open and undefended coast towns of the enemy by bombardment from the sea, or to extract enormous ransoms by the threat of it.[3] In 1896 the Institute of International Law produced a series of excellent rules on the subject; [4] and the United States Naval War Code of 1900 summarized in a single Article the cases in which a fleet might proceed to extremities.[5] Thus guided, the second Hague Conference negotiated a Convention which reconciles in an admirable manner the claims of humanity and the necessities of warfare.[6] It begins with a definite prohibition of the bombardment by naval forces of "undefended ports, towns, villages, dwellings, or buildings." But to this wholesome rule it permits two exceptions, irrespective of anything that might be done by way of reprisals for some gross breach of the laws of war on the part of the inhabitants. If "military works, military or naval establishments, depôts of arms or war material, workshops or plant which could be utilized for the needs of the hostile fleet or army" are found in the place, or ships of war in its harbor, the commander of

[1] [Garner, *International Law and the World War*, vol. I, §§ 269–272.]

[2] Higgins, *The Hague Peace Conferences*, pp. 70, 71.

[3] Holland, *Studies in International Law*, pp. 96–106.

[4] *Annuaire de l'Institut de Droit International*, 1896, pp. 313–315.

[5] See Article 4.

[6] Higgins, *The Hague Peace Conferences*, pp. 346–357; Whittuck, *International Documents*, pp. 167–172; Scott, *The Hague Peace Conferences*, vol. II, pp. 436–446; *Supplement to the American Journal of International Law*, vol. II. pp. 146–153.

the naval force must request the local authorities to destroy them within a fixed time. Should they fail to do so, he may destroy them himself by means of artillery fire, "if all other means are impossible." He may even bombard them without notice, doing as little damage as possible to the town, if the exigencies of war demand immediate action; but neither in that case nor in any other may he deliberately lay his guns on "buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided that they are not used at the time for military purposes." Such buildings or localities must be indicated by "large, stiff, rectangular panels, divided diagonally into two painted triangular portions, the upper portion black, the lower portion white." The second exception provides for the case of a failure on the part of the local authorities to comply with a demand for requisitions. These are restricted to "provisions or supplies necessary for the immediate use of the naval force before the place," and they must be proportioned to its resources. Money payment should be made for them, or receipts given. Demands for them are to be made only in the name of the commander of the naval force; but if they are refused, the place itself may be bombarded. No other exceptions are allowed in the Convention. Its fourth Article expressly forbids bombardment of undefended coast towns for the non-payment of money contributions, or, in other words, ransom. An end is thus put, let us hope forever, to the outrageous idea that modern laws of war allow the fleets of civilized powers to roam up and down the territorial waters of their enemies, spreading death and destruction inland as far as their guns will carry. No attempt was made in the Convention to define an undefended town; but it was stated that a town cannot be regarded as defended, and therefore subject to bombardment, "solely because automatic submarine mines are anchored off the harbor." Great Britain, Germany, France, Japan, Spain, and China made reservations against this regulation. Mines are not only a defence, but a defence that is dangerous to peaceful vessels as well as hostile squadrons. That the Conference actually en-

couraged the laying of them as if they were innocuous is a proof of its obsession by the subject. The rule it laid down cannot stand, with nearly all the great naval powers unbound by it. The severe maritime struggle [of the great war] demonstrated its futility. [During the great war, English sea-side towns, like Hartlepool, Whitby, Scarborough, and Lowestoft, were shelled by German warships with considerable loss of life to persons who were nearly all non-combatants. The German excuse was that the towns were fortified, or else defended by troops; and, alternatively, that the purpose of the bombardment was the destruction of signalling stations, military buildings, and other objects that may lawfully be attacked. At Hartlepool there was, it is true, a weak battery, but admitting this and assuming for the moment that there were objects such as barracks, wireless and coastguard stations and the like in some of these towns, a grave question is raised whether the towns were therefore "defended," and whether these things fell under the vague phrases "war material" and "plant" and might thus be lawfully destroyed according to the Convention. The committee of the Hague Conference which sat on the Convention had attempted no definition of "undefended," owing to the difficulty of distinguishing between the defence of a coast town and of a town near the coast. Indeed the problem is just as unsolved as in the parallel case of land bombardment. The Convention was not ratified by all the signatory powers, and therefore did not bind the belligerents, but the rules embodied in it, if interpreted according to the true spirit of the laws of war, probably represented International Law. That spirit is that no unnecessary suffering shall be inflicted on an enemy, and the killing of scores of non-combatants without any material military gain to the destroyer is contrary to it. But a revision of the Convention which would make this explicit is urgently needed.[1]

Every uncertainty that besets the law as to bombardments by land or sea infects the law as to attacks by aircraft, with the additional complication that we have to deal with a comparatively new arm of warfare. Two generations ago, balloons

[1] [Garner, *International Law and the World War*, vol. 1, §§ 273–278.]

were scientific toys, and the aeroplane was so little developed as late as 1896 that a flight of half a mile was then regarded as an astonishing feat. When therefore the matter came before the Hague Conference of 1899, the powers represented there were dealing with rudimentary weapons the possibilities of which they could not foresee. They agreed to a Declaration prohibiting for a period of five years the discharge of projectiles and explosives from balloons, or by other new methods of a similar nature. But they adopted this only because the aeroplane was too imperfect then to be of any practical use in war. When however the Hague Conference met again in 1907 the science of aerostatics had advanced so much that the question was a burning one, and only 27 out of 44 states signed the renewal of the Declaration of 1899, and only 15 ratified it. Among the states who did not sign were Germany, France, Italy, Japan, Russia, and Serbia. And even the signatory powers were not bound by it if a non-signatory power entered a war in which any of them were engaged. Thus, on the outbreak of the great war, the Declaration bound none of the belligerents. Aircraft were used, it may be noted here, for a number of perfectly lawful purposes like scouting and attacks on naval and military persons and property within the area of warlike operations. But they were soon employed by the Germans for the purpose of dropping bombs on towns far distant from the theatre of war, and a great number of innocent civilians were consequently killed or injured in British and French towns. Great Britain and her allies were driven to adopt counter-measures by way of reprisal, and by the end of the war aircraft attacks on towns were common events. As the Hague Declaration was not binding, aerial bombardments must be judged on general principles, and we may start with one that was informally admitted in the discussions preceding the 1907 Declaration. It was that bombardment by military balloons is subject to the same restrictions as in land and sea warfare, in so far as these are compatible with aerial attacks. This was no part of the Declaration itself, but we may at least test it with reference to air warfare. What then are the restrictions, and how must they be modified to suit aircraft? There

are, first, restrictions as to the kind of projectile which may be launched. These are stated in the next section and need not be repeated here. It is enough to say that there is no reason why they should not apply to aircraft. Secondly, there are restrictions as to the objects which may be attacked, and again there is at first sight no reason why they should be varied in aerial attacks. We have already referred to them in land and sea bombardments. But here several difficulties arise. We do not know what a "defended" place is, nor whether aerial bombardment should be subject to the rules in land attacks or to those in naval attacks; for the rules are not identical. And even if they were, we have shown that they are anything but satisfactory. In fact the whole law as to bombardments of any kind needs revision, and, until this is done, it is impossible to state it with certainty. Any future amendment must take into account the fact that aerial attack has not at present the precision of field and naval gunnery; and also the advisability of allowing bombing raids on "mixed agglomerations of population," namely civilians. For the rest, the principle which should be applied is the broad one laid down in Article 23 (*e*) of the fourth Hague Convention, that the employment of arms, projectiles, or material of a nature to cause superfluous injury is especially forbidden. This is one of the plinths of the modern laws of war. If aviators cannot hit a legitimate target with better aim than the Germans did in the great war, aerial bombardment can never be lawful. But there is little need to labour the point as to accuracy of aim in this particular instance, for it was practically never attempted by the Germans, whose policy it was to drop bombs indiscriminately in the hope that the more civilians they killed, the more they would frighten. The military gain from this grotesque inversion of the purposes of war was negligible, and any system that legalized it would drive men back to cave-dwelling to escape the attacks of men with the cave-dweller's ideas of humanity.] [1]

[1] [Spaight, *Aircraft in War* (1914). Ellis, in *American Journal of International Law* (1914), vol. VIII, pp. 256–273. Garner, *International Law and the World War*, vol. I, ch. XIX. Fauchille, *Droit International Public*, vol. II, §§ 1440[20]–1440[41]. *Grotius Society*, vol. VII (1922) pp. 33, 73, 109. Winfield in *Law Magazine and Review* (1915) vol. XL, pp. 257–271.]

§ 205

There is an obvious connection between the subject of bombardments and that of

*Projectiles.*

When once it was generally admitted that the limit of a belligerent's moral right to inflict pain and injury was reached when he had destroyed his adversary's power of resistance, applications of this principle to the kind of projectiles he might fire from his guns were certain to be made. Even before civilized states had practically agreed that the only legitimate object of warlike operations is to weaken the forces of the enemy and induce him to sue for terms, they began to object to certain means of destruction. Sometimes the ground of objection was their newness, sometimes their secrecy, and sometimes the vastness or cruelty of their destructive force. In one age the cross-bow was anathematized, in another the arquebus, in a third the bayonet.[1] There was a long controversy about red-hot shot till the invention of rifled cannon rendered it obsolete. In the eighteenth and nineteenth centuries a customary rule against the use of what was technically called "langridge" grew up. The term includes nails, buttons, bits of glass, knife-blades, and any kind of rubbish that can be fired out of a gun. Such missiles inflicted jagged wounds without being one whit more effective than bullets in preventing combatants from continuing the fight. Objections to them were doubtless based largely on sentiment and considerations of military honor; but there was also a more or less conscious application of the true principle, which measures the illegality of weapons, not by their destructiveness, but by the amount of unnecessary suffering they inflict. Fighting men may be wounded or slain in wholesale fashion, but they may not be tortured. The use of torpedoes, for instance, is perfectly lawful, though they may hurl a whole ship's crew into eternity without a moment's warning; but the deliberate insertion of a drop of sulphuric acid into the head of a bullet, from which it would exude on contact with

Projectiles.

[1] Maine, *International Law*, Lect. VII.

human flesh, would be execrated as a gross violation of the laws of civilized warfare. No objection was made to the revival of hand grenades in the Russo-Japanese War; but when expanding bullets were resorted to on a few occasions in the South African War, Britain and Boer accused each other of callous illegality.

The first appearance of rules founded on this principle in law-making international documents dates from 1868, when a large number of powers sent delegates to a Military Commission at St. Petersburg, the result of which was a Declaration prohibiting the use of explosive projectiles weighing less than fourteen ounces.[1] It has been signed by many powers, and was incorporated by reference in the Hague Code for land warfare, when the twenty-third Article added "the prohibitions provided by special conventions" to a number of others expressly mentioned and described. Its object was to prevent the introduction of explosive bullets that might shatter an arm or a leg, without ruling out ordinary shells which burst on falling and scatter a shower of missiles. The Brussels Conference of 1874 repeated this prohibition in the thirteenth Article of its regulations, and also forbade in general terms "the use of arms, projectiles, or substances which may cause unnecessary suffering."[2] The Hague *Règlement* concerning land warfare lays down the same rule in almost the same words.[3] The three Declarations inserted in the Final Act of the first Peace Conference made an attempt to apply the principle, and extended it in the process. The first bound the contracting parties to prohibit for five years "the discharge of projectiles and explosives from balloons, or by other similar new methods." The second forbade "the use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases." The third provided for abstention from "the use of bullets which expand or flatten easily in the human body." [The first of these Declarations has been discussed in the preceding section.] The second Declaration was sub-

[1] Higgins, *The Hague Peace Conferences*, pp. 6, 7.

[2] British Parliamentary Papers, *Miscellaneous*, No. 1 (1875), p. 321.

[3] See Article 23 (e).

ject to no time limit, and therefore still holds good. Yet it is not easy to see how quick asphyxiation exceeds in cruelty the blowing of a human body to pieces by the bursting of a shell. Slow torture by chemical methods might well be forbidden; but immediate death after inhaling deleterious fumes is comparable to drowning, which is often the fate of seamen in a naval engagement. [Gas, asphyxiating or poisonous, was first used by the Germans in the second battle of Yprès, 1915, and from that point onwards continuously throughout the great war by many belligerents, the British and French resorting to it as a retaliatory measure. It was either released from reservoirs in the trenches, and allowed to drift over with the wind to the enemy's lines, or was inclosed in shells or drums and fired like any other projectile which bursts on its target. Later tear-shells, or shells charged with lachrymatory gas were employed, and so were "mustard-gas" shells which, in bad cases, temporarily blinded the victim. The last two kinds may be disposed of at once. Tear-shells caused only temporary inconvenience, and did not infringe the laws of war, and perhaps the same may be said of "mustard-gas." As to the legality of other kinds of gas, a distinction must be drawn between those that were poisonous and those that were asphyxiating or deleterious. The use of poisoned arms was, as we shall see, forbidden by Article 23 (*a*) of the fourth Hague Convention, and gases like chlorine and phosgene were not only poisonous, but often caused a lingering and painful death or illness, and were therefore obnoxious also to Article 23 (*e*) which forbids the employment of arms, projectiles or material of a nature to cause superfluous injury. The only argument in their favor is that efficient measures, like gas-masks, were devised to counteract them, and, though the Hague Convention takes no account of this possibility, it is proper matter for consideration in a revision of the laws of war, at any rate in cases where there is sufficient time to adopt the protection, as where the gas is released from stationary cylinders. As to asphyxiating and deleterious gases, the second Declaration cited above is inadequate, for the word "deleterious" is vague, and, as the author points out, it is hard to see why quick

suffocation by gas is any more cruel than that by water. If gas kills a combatant almost immediately, or puts him out of action, without needless pain or permanent evil results, it is not unnecessarily cruel.[1] No such distinction is, however, drawn in the treaty between the United States, the British Empire, France, Italy, and Japan, signed on February 6, 1922, at Washington. By Article 5 thereof, "the use in war of asphyxiating, poisonous or other gases, and all analogous liquids, having been justly condemned by the general opinion of the civilised world and a prohibition of such use having been declared in treaties to which the majority of the civilized Powers are parties, the Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other civilized nations to adhere thereto."][2]

The third Declaration, like the second, was passed without a clause providing for its expiry after a fixed period of years. Great Britain and the United States declined to sign it in 1899, but the former gave in her adhesion in 1907. It comes clearly within the fundamental principle we have seen reason to enunciate; for a bullet which by expanding or exploding shatters a limb to pieces tortures the man it hits, but does not render him more incapable of continuing the fight than he would have been if shot by a bullet that inflicts a clean wound. The hesitation of Great Britain, and the continued refusal of the United States to sign, were due to the same cause. Both countries drew a distinction between explosive and expanding bullets, and maintained that the latter did not inflict unnecessary cruelty, especially in warfare with wild tribes whose rushes it was necessary to stop. The United States, acting on the view that the Declaration as adopted by the Conference did not include several kinds of bullets which cause needless laceration of tissues, suggested a formula which would have forbid-

[1] [Garner, *International Law and the World War*, vol. I §§ 180–183. Fauchille, *Droit International Public*, vol. II §§ 1082, 1440[21].]

[2] [*Parliamentary Papers. Miscellaneous*, No. 1 (1922). Cmd. 1627, p. 21.]

den "every kind of bullet which exceeds the limit necessary for placing a man immediately *hors de combat*," but discussion of it was ruled out on points of order.[1] The adhesion of Great Britain and Portugal in 1907 leaves the United States in the position of being the only member of the first Hague Conference that is not bound by the Declaration. The signatures of the Latin-American States which attended the second Conference, but not the first, are also wanting, The result is that bullets of a kind forbidden in Europe can be used in warfare between American powers. [Though accusations of the use of expanding and other needlessly cruel bullets were made against nearly all the belligerents during the great war, there is no satisfactory evidence that any state authorized or connived at their employment.[2]

We may add here a word as to another mode of attack first used in the great war, the liquid fire projector. It was introduced by the Germans in the shape of an instrument from which, on the release of a tap, a jet of flame spurted out for twenty or thirty yards. There is no express prohibition of this in the Hague Convention, and unless it falls within the description of material of a nature to cause superfluous injury, it is not unlawful. Any combatant within the radius of the flame would almost certainly be killed as instantaneously as if a shell burst upon him.[3]]

The attempts which have been made to forbid the introduction of new inventions into warfare, or prevent the use of instruments that cause destruction on a large scale, are doomed to failure. Man always has improved his weapons, and always will as long as he has need for them at all. But we can hope for a general recognition of the inutility as well as the cruelty of adding torture to disablement. Suffering there must be, as long as there is war. But unnecessary suffering ought to be, and can be, abolished.

[1] Scott, *The Hague Peace Conferences*, vol. I, p. 62, note; Article by General Davis in *American Journal of International Law*, vol. II, pp. 75–77.

[2] [Garner, *op. cit.* §§ 176–179.]

[3] [*Ibid.* § 189.]

§ 206

The next subject to be discussed in connection with the instruments and methods of warfare is

*Devastation.*

Devastation.

The savage customs of ancient warfare allowed unlimited destruction in an enemy's territory. We have already seen how in comparatively recent times better practices were gradually introduced,[1] till now an invader, instead of being free to destroy a country, finds himself charged with the duty of protecting property and industry within it. Grotius endeavored to restrict the old right of unlimited destruction by laying down that only "such ravage is tolerable as in a short time reduces the enemy to seek peace,"[2] and even this he endeavored to surround with all sorts of limitations. The publicists of the eighteenth century followed in his footsteps, and their successors have gone steadily forward in the same direction. Vattel, for instance, says that the utter destruction of a hostile territory is authorized and excused in two cases only. The first is when there exists a "necessity for chastising an unjust and barbarous nation, for checking its brutality and preserving ourselves from its depredations," and the second exists when there is evident need "for making a barrier for covering a frontier against an enemy who cannot be stopped in any other way." [3] In discussing the question he practically adds as a third case the destruction that may be required in order to carry on field operations or the works of a siege. There can be no doubt about this last instance. The laws of war allow the suburbs of a town to be destroyed in order to keep the besiegers from effecting a lodgment in them, or afford free scope to the action of defending artillery. Buildings may be demolished and trees cut down to strengthen a position, and even villages burnt to cover a retreat. But such devastation must be absolutely necessary for the attainment of some

[1] See §§ 176–179 [and Hall's *International Law*, 7th ed., § 186.]

[2] *De Jure Belli ac Pacis*, bk. III, ch. xii.

[3] *Droit des Gens*, bk. III, §§ 167, 168.

direct and immediate military end. It is not enough that there should be merely a vague expectation of future advantage to accrue from the act.

In warfare with barbarous or semi-barbarous races, the first exception allowed by Vattel is often acted on, especially when punitive expeditions are sent to chastise savages for outrages of which they have been guilty. When the punishment is made to fall on the real offenders, whether tribes or individuals, and the measures taken are unstained by brutality or license, these operations may prevent similar outrages in future, and thus conduce to the welfare of mankind. But the greatest care should be shown in conducting them. Considered as agents of avenging justice, shells often show a painful lack of discrimination. They are apt to destroy the innocent as well as the guilty.

Vattel's second exception is allowed no longer. A belligerent who devastated his enemy's territory in order to make a barrier and cover his own frontier, would now be held up to the execration of the civilized world. The ravaging of the Palatinate in 1689 was justified by the French Government on this ground; but, as Vattel himself says with regard to it, "All Europe resounded with invectives and reproaches." We have advanced a long way in the direction of humanity towards foes since that time, and what was denounced then would not be tolerated now.

When we turn to modern law-making documents we find that both the Brussels Conference and the two Hague Conferences laid down the only general rule possible for civilized states. Article twenty-three of the Hague *Règlement* declares that it is forbidden "to destroy . . . the enemy's property, unless such destruction . . . be imperatively demanded by the necessities of war." It may be taken for granted that the necessities of war include the destruction of whatever property interferes with the operations of a conflict, an advance, or a retreat. No general would, if he could help it, allow a bridge to stand which an enemy might cross to attack his positions, or a railway in his rear to remain intact to facilitate the onward march of his pursuers. Nor would he

hesitate to blow up a factory, or even a church, that blocked the way for his artillery up a narrow valley. Again, a naval commander, charged with the duty of destroying a nest of pirates, would not scruple to shell them out of their stronghold and then land a party to burn it. Moreover, the deliberate destruction, by fire or explosives, of buildings from which shots were fired on invading troops by non-combatants or unauthorized combatants, is an act which any officer who cared for the safety of his men would feel bound to order. None of these things would be accounted unlawful. But how far beyond them is it legitimate to go? The phrase "necessities of war" is vague and elastic, and the interpretation given to it in practice will depend largely on the personal character of those who direct the armies. It is clear that the necessity must be fairly direct and immediate, else it would be possible to justify the most atrocious acts, such, for instance, as the slaughter of unarmed lads lest they should in future recruit the enemy's forces. The magazines and stores of an enemy may certainly be given to the flames; but may a force marching through a fertile belt of hostile country burn barns and standing crops, on the plea that the district is the granary of the enemy? This was the ground alleged in justification of much of the farm-burning by the British in the later stages of the Boer War, and of the devastation of the Shenandoah Valley by Sheridan and parts of Georgia and South Carolina by Sherman in the American Civil War. It hardly seems sufficient. If an invader can occupy a district, its resources are his to tax to the bone by way of requisition as long as he does not reduce the inhabitants to actual starvation. But if he cannot, it may well be doubted whether his war-right allows him to send columns through it, and mark their track by ruin and destruction. The case of a semi-guerilla war, like that of 1901 and 1902 in South Africa, carried on over vast tracts of sparsely settled country, presents special difficulties, for its military occupation in the usual sense is practically impossible. The British destroyed the farms over wide districts, removing the non-combatant inhabitants and caring for them in concentration camps.

This device, so humane in conception and so costly of infant life in effect, gave rise to an enormous amount of heated controversy. It is much to be wished that civilized mankind could agree to define the emergencies on which it is lawful to devastate, instead of leaving the matter in its present indeterminate condition. The experience of the British in the South African War, when the Boer commanders supplied themselves from Kaffir kraals and captured convoys, shows that devastation may be as useless as it is unmerciful; and in such cases even the costly expedient of feeding the dispossessed inhabitants ought not to be held to justify the destruction of their dwellings and property.[1] [Whatever doubt may attach to the meaning of the phrase "necessities of war," there can be none whatever that it did not justify the dreadful devastation by the Germans of the Somme area in their withdrawals during 1917 and 1918. It was not merely that this or that particular object within the probable line of battle was destroyed. That might have been lawful through military necessity. But here the devastation was universal. "In the course of these last months," it was admitted by the Germans in March, 1917, "great stretches of French territory have been turned by us into dead country. It varies in width from ten to twelve or fifteen kilometres, and extends along the whole of our new position, presenting a terrible barrier of desolation to any enemy hardy enough to advance against our new lines . . . . In front of our new positions runs, like a gigantic ribbon, an empire of death."][2]

A broad distinction must be drawn between devastation by an enemy and devastation by a population to repel an enemy. If a nation is willing to consign to destruction its own homes and possessions in order to stop the advance of invaders or weaken them by cutting off sources of supply, International Law in no way forbids such a piece of heroic self-sacrifice. History has nothing but praise for the Dutch who in the war of independence cut their dykes, and let in the sea as a

[1] *Times History of the War in South Africa*, vol. v, p. 254.

[2] [Garner, *International Law and the World War*, vol. I, ch. XIII. *Journal du Droit International*, vol. XLV, p. 1618.]

defence against the Spaniards. And similarly, the action of the inhabitants of Moscow, who left their city and allowed it to be given to the flames in order that it might not be used as winter quarters by Napoleon's army, has always been regarded as a splendid example of patriotic devotion.

§ 207

We must now consider the question of the use in war of

*Stratagems.*

Stratagems.

They are ruses practiced on the enemy in order to mislead him and put him off his guard. That they may be used at all is due to the fact that war is a conflict of wits quite as much as a conflict of arms. In ordinary peaceful intercourse men are expected to avoid deceits, though in certain games feints of a particular kind are allowed by the rules; and he who breaks the general undertaking is a moral wrong-doer, and often a legal offender also. In war things are reversed. The general undertaking is confined to comparatively few matters. It is as immoral to violate these conventions as it would be to lie and cheat in ordinary society. But outside them, every kind of misleading device is legitimate, and the most honorable of commanders constantly resort to them. Some branches of the general undertaking between belligerents are now defined and regulated by special agreements, while others derive their force from usage only. Chapter III of the Hague Code for war on land deals with flags of truce;[1] the Geneva Convention prescribes the red cross on a white ground as the badge that exempts the personnel and material of the hospital and ambulance service from hostile attack;[2] the ninth Hague Convention of 1907 introduces a new sign to be hoisted over buildings entitled to be spared in bombardments by naval forces,[3] and the tenth Hague Convention of 1907 sets forth the marks whereby military hospital ships are to be known, and the presence of which gives them protection.[4] In all these cases the signatory

[1] See § 21.
[2] See § 165.
[3] See § 204.
[4] See § 165.

powers would be dishonoring their own signatures as well as violating a wholesome and humane rule, if they either fired on the signs when properly used, or used them for other purposes than those which they indicate. Any stratagem that involved such action would be grossly illegal, and might subject its authors to severe reprisals from the enemy and punishment from their official superiors.

Questions connected with uniforms and flags rest almost entirely on usage, and are, therefore, sometimes doubtful, since practice is by no means consistent, and great authorities differ on important points. The only reference to them in law-making international documents is contained in the twenty-third Article of the Hague *Règlement*, which in its list of things forbidden to belligerents includes "improper use of. . . the national flag, or of the military insignia and uniform of the enemy." No attempt was made to define improper use, and we are therefore thrown back on custom and its interpreters. All are agreed that troops engaged in actual conflict must not wear the uniform or carry the ensigns of the enemy. But may they do these things in order to secure an unmolested advance to the attack, if they don a distinguishing badge at the moment when the conflict begins? There is a school of writers who see no harm in such conduct.[1] But another and on the whole more modern school denounce it,[2] and with good reason. A national uniform is a well-known sign that is supposed to mean one and the same thing always and at all times. Its use was adopted in order that belligerents might know friends from foes; and so important was knowledge of this fundamental distinction deemed that when states discussed the conditions on which they would consent to legalize irregular combatants they placed among them the wearing of a distinctive badge recognizable at a distance.[3] These precautions would be nullified, if troops were to creep up to the enemy's lines, and even into his encampments, in the guise of friends. In the American Civil War

[1] *E.g.* Hall, *International Law*, 7th ed., § 187.

[2] *E.g.* Fauchille, *Droit International Public*, vol. II, § 1087.

[3] Hague *Règlement*, Article 1.

when the ill-clad Southerners, as sometimes happened, clothed themselves in military greatcoats and uniforms from captured Northern depôts or convoys, they were expected to place some distinguishing mark in a conspicuous position. In the South African War owing to the absence of uniforms on the part of the Boers at the beginning, and the absence of clothing at the end except what they took from the British, the rule was practically waived[1]; but the circumstances were so extraordinary that they can hardly constitute a precedent. Stratagems that do not violate any express or tacit understanding between belligerents are perfectly lawful. Every general knows that he must guard against them by his own vigilance. [The use of a false flag by a warship is permissible, provided she hoists her true colors before attacking. The question whether a merchant ship may adopt the same ruse was debated during the great war by the British and United States governments. The latter represented the possible dangers to their own vessels (then neutral) if the practice of using their flag became general. But this has occurred in previous wars where merchant vessels wished to avoid capture, and, as any neutral merchantman is liable to visit and search by a belligerent, and these operations must be conducted with due regard to the safety of the vessel visited, it is hard to see why the use of false colors should be objectionable.][2]

§ 208

We have now to deal with

*Assassination.*

Assassination.

The life of some one person is often of the last importance to a cause, and when that is the case its enemies are under great temptation to get rid of its champion by murder, if all other means fail. Such assassinations for public purposes seem to have been regarded with approval in ancient and mediaeval times. Grotius, in the course of an elaborate discussion of the subject, indicates

[1] *Times History of the War in South Africa*, vol. v, p. 255.

[2] [Hall, *International Law*, 7th ed., § 187.]

the all-important point, which is not the act of killing, but the presence or absence of bad faith or treachery in the surrounding circumstances.[1] Modern International Law distinguishes between dashes made at a ruler or commander by an individual or a little band of individuals who come as open enemies, and similar attempts made by those who disguise their enemy character. A man who steals secretly into the opposing camp in the dark, and makes alone or with others a sudden attack in uniform upon the tent of king or general, is a brave and devoted soldier. A man who obtains admission to the same tent disguised as a peddler, and stabs its occupant when lured into a false security, is a vile assassin, and the attempt to procure such a murder is as criminal as the murder itself. Article 148 of the Instructions issued in 1863 to the armies of the United States declares with perfect justice that "Civilized nations look with horror upon offers of rewards for the assassination of enemies, as relapses into barbarism." [2] The Hague code for war on land declares that it is especially forbidden "to kill or wound treacherously individuals belonging to the hostile nation or army." [3]

§ 209

The next and last of the methods and instruments of warfare to be considered is

*Poison.*

Poison.

Savages use poisoned weapons; but civilized mankind has expelled them from its warfare, and refrains from the poisoning of food or water, or the inoculation of the enemy with disease. The secrecy and cruelty associated with death by poison, and the danger that innocent people may be made to suffer along with or instead of foes, will serve to account for the deep-seated abhorrence of such a method of destruction. Grotius condemns it as contrary to the sentiment of the best and most advanced nations,[4]

[1] *De Jure Belli ac Pacis*, bk. III, ch. IV, 18.
[2] Davis, *Outlines of International Law*, p. 425.
[3] See Article 23 (b).
[4] *De Jure Belli ac Pacis*, bk. III, ch. IV, 15–17.

and the other text-writers agree with him. The Hague Conference *Règlement* mentions it only to exclude it from the permissible means of injuring an enemy.[1] But the experience of the Boer War seems to show that the contamination of water by the carcasses of animals is not forbidden.[2] [During the great war, the Germans emptied bags of poisonous cattle-dip into some of the wells from which British troops in Africa drew their water supply. The German commander defended his action by pointing out that warning notices had been placed near the wells. The Hague Conference rule unqualifiedly, forbids the use of poison and the German plea therefore appears to be unsound. If troops are fighting one another in a district where there are no civilians, and where intelligible notice of the poisoning has been given, it is arguable that the rule might be amended, so as to allow this as an exception, for it is in effect merely cutting off a water supply, and that is permissible. But where there are civilians in the neighborhood likely to use the wells, the poisoning of them, whether it be notified or not, must always be unlawful. The German practice of contaminating with creosote of soda and dung wells in districts of France from which they were retreating was unlawful. If this were poison, then it directly contravened the Hague Convention already mentioned; if it were pollution only, then it was an infraction of Article 23 (*g*), which forbids the destruction of the enemy's property, unless it be imperatively demanded by the necessities of war.[3] An attempt to infect enemy subjects with tuberculous or other germs would be equally unlawful; for if it be civilians who are affected, then it is making war on non-combatants, and if the military forces of the enemy, then it is employing material that causes superflous injury.] [4]

[1] See Article 23 (a).

[2] Maurice, *Official History*, vol. II, p. 164.

[3] [Cf. Garner, *International Law and the World War*, vol. I, § 190. Oppenheim, *International Law*, vol. II, p. 171, note 3.]

[4] [Cf. *Journal du Droit International* (1917), vol. XLIV, p. 95. Fauchille, *Droit International Public*, vol. II. §1084.]

§ 209 a

[We can appropriately conclude this chapter with some discussion of

*The sanctions of the laws of the war.*

In the preceding sections, we have repeatedly chronicled gross breaches of the laws of war, nearly all of them committed by one belligerent during the great war. It may naturally be asked whether their continuous perpetration was not a striking proof of feebleness in the binding force of International Law. We may say at once that the experience of 1914–1918 testified to both the strength and the weakness of the sanctions of our system. In order to establish this, some preliminary account is needed of the chief sanctions of the laws of war as they stood at the outbreak of the great war. They may be classified under four heads, *state-compensation*, *reprisals*, *punishment of war crimes*, and *interference by neutral powers*. As to the first of these, Article 3 of the fourth Hague Convention of 1907 provides that a belligerent party which violates the regulations of the Convention shall, if the case demands, be liable to make compensation, and shall be responsible for all acts committed by persons forming part of its armed forces. This liability is in the nature of a civil, rather than a penal, remedy. Whether the Article would be anything more than a pious resolution if the offending state were victorious in the war may well be doubted. As to reprisals, they have here a sense quite distinct from that which we have already considered under measures of redress falling short of war.[1] They signify the commission by one belligerent of what would otherwise be illegal acts of warfare in order to compel the other to refrain from breaches of the laws of war; e.g., indiscriminate aerial bombardment of undefended places. Innumerable reprisals of this kind were resorted to during the great war. On principle, they are open to several objections. They almost certainly involve a great deal of suffering by innocent people, and they may be a total failure if the offending belligerent, so far from amending his ways, indulges in counter-reprisals. Thus Great

[1] [See § 136.]

Britain and France occasionally found that reprisals were ineffective against the Germans who were quite ready to retort by practising greater cruelties and going further along the path of barbarism than the *entente* powers were prepared to follow them. Yet, until better measures are perfected for securing observance of the laws of war, reprisals cannot be abandoned, and even against Germany they sometimes achieved success.[1] Violations of the laws of war may also be punished as "war crimes" by the injured state when it captures the offenders. This is a great improvement on reprisals which fall on the just and the unjust alike, but it is not satisfactory. For the better opinion is that where the offence is committed in obedience to superior orders, it is only the superior who can be punished, and he is often much less likely to be caught than the man who does the act.[2] In short, while reprisals are likely to go too far, punishment of war crimes does not go far enough. Finally, there is the possibility of interference by neutral states. Friendly representations by them could not be taken amiss, for every belligerent wishes to stand well with neutrals. Yet it may decide to risk their displeasure if it is of opinion that there is less to lose by incurring it than by abandoning a course of law-breaking; and unfortunately there is always a probability of this with an unscrupulous and powerful belligerent, for though there is a theoretical right for neutrals to join in the war against the law-breaker as a final protest against his offences, yet in practice they do not take this course. It is only when their rights as neutrals are outraged that they will do so, and not when it is the rights of the other belligerent that are violated.

Such was the position down to the great war, and it reveals clearly fatal defects in the sanctions of the laws of war; and the war itself underlined those defects. But other occurrences during and after it have indicated the germs of a better system. In the first place, the civilized world stood arrayed at the end

[1] [Garner, *International Law and the World War*, vol. I, §§ 311–312; vol. II, §§ 355–357. Oppenheim, *International Law*, vol. II, §§ 247–250. Fauchille, *Droit International Public*, vol. II, §§ 1018–1026[3].]

[2] [Garner, *op. cit.* vol. II, § 588.]

of the war against Germany and her allies as champions of the great principles that are the pillars of International Law. Germany had begun a contest which, great as it was, might still have been localized if every one of these principles had not been flung aside from the invasion of Belgium onwards. What was a political struggle between the Central Powers and Russia in the first days of the war in 1914 had become a world battle in defence of International Law in 1918, and the issue of that battle was the greatest vindication that the Grotian system has received. But the price of it was heavier than any that humanity has ever paid for a cause, and what is urgently needed is some other sanction less ruinous and more speedy. This brings us to our second point which is marked by the attitude taken at the Washington Conference, 1921–1922, with respect to submarines. The agreement then made was that submarines which violated the rules of visit and search should be treated as pirates, and should be justiciable as such by any of the signatory powers.[1] This would enable any one of these powers, if it were neutral in a war between any of the others to punish this breach of the laws of war. In other words, a definite right of punishment is given to a *neutral* state for breach of a particular law of war committed by one belligerent against another; and the neutral can enforce this right without the clumsy havoc of going to war itself. Once get this special sanction for a special violation made general for all the laws of war, and a great step towards a regular system of punishment would be made. Moreover, the great war revealed a weapon for neutrals which may be quite as effective against a recalcitrant belligerent as war and without any of its sanguinary incidents. This is the economic blockade. If all supplies from neutrals were cut off, not many belligerents could carry on war long. But it would be unwise to expect too much of this, for the interests of neutrals naturally lie in keeping a belligerent supplied with what he wants at the high prices which invariably prevail during war; and there is little likelihood that this source of wealth will be abandoned merely because the belligerent commits atrocities against his enemy

[1] [See § 203 *a*.]

Lastly, we have to notice the clauses in the Treaty of Peace with Germany at Versailles, in 1919, for handing over to the Allied and Associated Powers persons accused of having committed acts in violation of the laws and customs of war, with a view to their trial by the military tribunals of the particular power affected. In pursuance of these Articles (228–230), long lists of offenders, many of whom were highly-placed military and naval leaders in Germany were sent to the German government which, however, demurred on political grounds to the general surrender of these persons. In the end, a compromise was effected by arranging that the German Supreme Court should try the offenders at Leipzig. The British government submitted the names of seven persons charged with grave outrages against the laws of war, two for sinking hospital ships, one for sinking a merchant ship and drowning nearly the whole of the crew by submerging the submarine while they were on its deck, and four for maltreatment of prisoners of war. Three of the accused were out of jurisdiction, so that their trial was impossible; but four were tried, one being acquitted, and three convicted and sentenced. Two other persons not in the list submitted by Great Britain were also tried and convicted.[1] It is hardly necessary to observe that this did not exhaust the list of German war criminals. What use can be made of this as a precedent for trying war criminals by this peculiar method in the future must be matter for speculation. It is important to recollect that it was due to stipulations in a treaty made with a beaten foe, and that considerable difficulties were incurred in the collection of evidence against the accused. One remarkable feature in the trials was the acquittal of Lieutenant-Commander Karl Neumann on the ground that he acted under superior orders in sinking the hospital ship, *Dover Castle*. According to German Law this decision was correct, and apparently International Law indorses it. But it opens a wide door to irresponsibility for war crimes. For, if a policy of barbarity be inaugurated

[1] [*Parliamentary Papers. German War Trials* (1921) Cmd. 1450. C. Mullins, *The Leipzig Trials* (1921). Lord Phillimore in *British Year Book of International Law* (1922–1923), pp. 79–86.]

by the supreme command in a belligerent's forces, it is difficult to see how any agent carrying out the policy can be punished. No doubt the high officials who originated the policy are punishable, but they must be captured first and this is unlikely during the war because they are very rarely in the battle-line. Their surrender after the war seems to be equally improbable in view of the fact that the worst offenders in the great war were the most highly-placed ones, and yet they were precisely the persons who were never brought to trial. Indeed the attempt to bring the German Emperor to justice must have involved such difficulties of procedure that the British government were probably fortunate in meeting with the rebuff which Holland justly administered to them in refusing to surrender the Kaiser. If, on the other hand, subordinates are made liable even if acting under superior orders, it is too much to expect that any soldier will face the certainty of being shot for disobeying an order which he knows to be illegal, instead of taking his chance of the remote probability of being tried at the end of the war for a war crime. It is to be noted, however, that the powers at the Washington Conference, 1921–1922 adopted this sterner view of a subordinate's duty in their treaty with respect to submarines.][1]

[1] [See § 203 *a*.]

## CHAPTER VII

### THE NON-HOSTILE INTERCOURSE OF BELLIGERENTS

§ 210

During war a certain amount of more or less amicable intercourse takes place between the belligerents. We cannot call it pacific, because it presupposes the existence of hostilities. On the other hand, it certainly is not warlike, for it involves at least the temporary cessation of active operations on the part of the combatants, or some of them. We are therefore obliged to characterize it as non-hostile, an epithet which has the merit of expressing exactly what we mean, though it is lacking in euphony. The amount of such intercourse that takes place depends upon the wishes of the belligerents, and therefore varies not only from war to war, but also in different periods of the same war and in different parts of the same theatre of hostilities. It is divided into several kinds, the chief of which we will consider in due order. It is impossible to give all because they are so numerous and so frequently modified by the incessant changes of warfare. Such phrases as "licenses to reside," "grants of asylum," and others of a like kind, carry with them their own explanation. Moreover, the things they signify are hardly important enough to be placed in a class by themselves.

The nature of non-hostile intercourse.

§ 211

The first of the *commercia belli* with which we have to do are

*Flags of truce.*

These are white flags used by one side as a signal that it desires a parley with the other, or as a sign of surrender. The Hague code for war on land declares that "a person is considered as the bearer of a flag of truce who has been au-

thorized by one of the belligerents to enter into communication with the other and who presents himself with a white flag." It adds that he may be accompanied by a trumpeter, a bugler, or drummer, a flag bearer, and an interpreter. The party enjoys "the right of inviolability," that is to say, its members may not be subjected to personal injury or detained as prisoners.[1] It goes without saying that the bearer of a flag of truce is entitled to this immunity if he comes without attendants. But the obligation to refrain from molestation is not absolute. In the first place, the commander to whom a flag of truce is sent is not bound to receive it. Custom prescribes that he must notify his refusal, and gives him the right to fire on the flag party if they continue to advance in spite of his notification. Further, in cases where there is no question of exclusion, the emissary or emissaries may be blindfolded, and they are held bound in honor not to take advantage of their position for the purpose of obtaining military information, whether or no physical means are used to hinder them. If important movements are on foot, and it is impossible that they should have failed to acquire some knowledge of them by the evidence of their own senses, they may be kept in honorable detention for a little while, till the operations are over, or till it is no longer necessary to keep them secret.[2] In the second place, anything approaching to treachery on the part of the bearer of a flag of truce deprives him of his personal inviolability.[3] If he purchases plans, or incites soldiers to desertion, or attempts to sketch defences, he may be deprived of liberty, or perhaps, in extreme cases, executed as a spy. These rules apply *mutatis mutandis* to naval warfare. At sea flags of truce are sent in boats, and are met by boats flying similar flags and conducted to the ship on which the officer in command is to be found.

Flags of Truce.

When a white flag is waved during a battle or hoisted over forts and besieged posts, it indicates a desire to surrender, or at least to parley with a view to surrender. But it must be

[1] See *Règlement*, Article 32.

[2] *Ibid.*, Article 33.

[3] *Ibid.*, Article 34; Holland, *The Law of War on Land*, p. 49.

raised by order of the officer in chief command on the spot. Otherwise it binds only those who raise it, and they may be fired on by their fellows to prevent the consummation of their act, as was the case with regard to some British soldiers in an exposed trench on Spion Kop during the South African War, and with some Boers at Driefontein.[1]

§ 212

Another mode of intercourse between belligerents is by

*Cartels,*

Cartels.

which are agreements entered upon during war, or in anticipation of it, in order to regulate some kinds of such intercourse as is to be allowed in the course of the struggle. They prescribe, for instance, the formalities to be observed in the exchange of prisoners, the reception of flags of truce, and the interchange of postal or telegraphic communications. Whatever regulations are laid down in them should be observed in good faith, and without any attempt to wrest them from their humane purposes, and turn them into means of obtaining information or gaining military advantage. Cartels for the exchange of prisoners were frequent incidents of wars between civilized powers, and may become frequent again in the event of a revival of the custom of exchange. The arrangements connected with the process were made and supervised by officers called commissaries, who were appointed by each belligerent, and allowed to reside in the country of the enemy. Cartel-ships were vessels employed in the conveyance of prisoners to and from the place of exchange. They were free from hostile seizure on the conditions set forth when we were considering the extent to which public vessels of the enemy are liable to capture.[2]

[1] *Times History of the War in South Africa*, vol. III, pp. 268, 283, 284.

[2] See § 181.

§ 213

The next subjects to be considered in connection with the relaxations of the strict rule of non-intercourse in warfare may be dealt with under the head of

*Passports, safe-conducts, and safeguards.*

Passports are granted by a belligerent government, and are generally made to apply to all territory in its control, whether under its sovereignty or under its military occupation. They are permissions to travel within such territory, given to enemy subjects who have satisfied those in authority that their objects in making the visit are innocent. Safe-conducts are granted either by a belligerent government, or by its naval and military officers. They apply to a particular place only, and any commander may grant them in the area under his control. Both passports and safe-conducts are revocable for good reason; but if they are revoked the grantee should be allowed to withdraw in safety. A limit of time may be named in these instruments, and a special purpose may be mentioned as the only one for which the permission is given. Whatever conditions are imposed must be carefully complied with, and both sides are held to the strictest good faith. A safe-conduct may be given in respect of goods only, in which case it is a permission to remove them without restriction as to the agent, but with an implied condition that he shall not be dangerous or otherwise obnoxious to the grantor. It is always understood that neither passports nor safe-conducts are transferable. Safeguards are grants of protection given to enemy persons or enemy property by belligerents, for the purpose of preventing any possible license on the part of their own forces. They generally take the form of a guard of soldiers, and these, if not withdrawn before the place where they are stationed passes under the control of the other side, possess immunity from attack, and must be properly cared for and sent back to their own side. Occasionally a written guarantee of protection is called a safeguard.[1]

Passports, safe-conducts, and safeguards.

[1] Fauchille, *Droit International Public*, § 1247.

§ 214

It sometimes happens, especially in maritime hostilities, that a belligerent grants

*Licenses to trade,*

which enable their holders to carry on a commerce forbidden by the ordinary laws of war or by the legislation of the grantor.

Licenses to trade.

Licenses are *general* when a state gives permission to all its own subjects, or to all neutral or enemy subjects, to trade in particular articles or at particular places, *special* when permission is granted to particular individuals to trade in the manner described by the words of the documents they receive. Both kinds remove all disabilities imposed because of the war upon the trade in respect of which they are given. The holders can sue and be sued in the courts of the grantor, and are allowed to enter into contractual relations with his subjects to the extent necessary in order to act on the terms of the license. General licenses can be granted only by the supreme power in the state. Special licenses generally emanate from the same source; but officers in chief authority on land or sea can issue permissions to trade in the district or with the force under their command. Such licenses, however, afford no protection outside the limits of the grantor's control. When the commander of an invading force issues a proclamation to the people of the country requesting them to sell him supplies, he gives them an implied license to trade in his camp.

During the revolutionary and Napoleonic struggle between Great Britain and France, a very large number of licenses were granted by both the belligerents. Napoleon's attempt to ruin England by excluding her manufactured goods and colonial produce from the continent of Europe brought about an enormous rise in the price of such commodities in all the countries controlled by him. Licenses to trade were sold at a high price, and towards the end of the war many of the supplies served out to the French troops came from English sources. Great Britain, too, sold or gave licenses; and on both sides Prize Courts were frequently employed in deciding

questions connected with their interpretation or with proceedings arising out of them. Owing to the changes that have taken place in sea warfare since the peace of 1815, much of the body of law thus developed has but an antiquarian interest. We will, therefore, pass over details, and give only those parts of it which may possibly be again enforced. Misrepresentation of facts is held to annul a license, and an individual who has received one by name cannot transfer it to others, though he may act through an agent. But if it is made negotiable by express words, it may be transferred like any other instrument. Slight deviations from the quantity or quality of the goods specified will not forfeit the license, nor will a slight alteration in the character of the vessel; but the use of a ship of one nationality when another was mentioned will cause forfeiture. Deviation from the specified course, or a delay in arrival beyond the specified time, may be excused when caused by stress of weather or some other unavoidable calamity; but delay beyond the time fixed for the commencement of a voyage will not be allowed.

§ 215

Most wars of any magnitude do not continue long without being marked by one or more

*Capitulations,*

which is the name given to agreements for the surrender on conditions of a fortified place, or a military or naval force. The conditions are set forth in the terms of the agreement, and vary from a promise to spare the lives of those who surrender to a grant of "all the honors of war" to the vanquished, a phrase which means that they are allowed to depart unmolested with colors displayed, drums beating, and their arms in their hands. It is not often that such ample terms are obtained, nor, on the other hand, does a mere promise to spare life confer any benefit upon the conquered beyond what is theirs already by the laws of modern warfare. Generally the conditions of capitulations range between the two extremes, being lenient

Capitulations.

or severe according to the nature and extent of the straits to which those who surrender have been reduced, and the degree of necessity the victors are under of ending their operations quickly. Sometimes, too, admiration for an heroic defence will cause more generous terms to be granted than the military situation would enable the beaten side to exact. This was the case at Appomattox, when the remnant of Lee's army surrendered to the Union forces on April 9, 1865, six days after the fall of Richmond and the destruction of the hopes of the Southern Confederacy. General Grant could certainly have enforced far harsher conditions than the dismissal to their own homes of the foes who, in his own words, "had fought so long and valiantly." [1]

Every officer in chief command of an army, fleet, or fortified post, is competent to enter into a capitulation with regard to the forces or places under his control; but if he makes stipulations affecting other portions of the field of hostilities, they must be ratified by the commander-in-chief before they become valid. Moreover, the ratification of the supreme authorities in the state is required when a commander, supreme or subordinate, makes a capitulation at political conditions among the articles he agrees to. Stipulations in excess of the powers of those who make them are called *Sponsions*, and are null and void unless the principals on each side accept them. In default of such acceptance, an agreement of the kind we are considering has no validity, and all acts done under it must be reversed as far as possible. A good example of a Sponsion is to be found in the Capitulation entered into by General Sherman in April, 1865, with General Johnston, the commander of the last Confederate army in the field east of the Mississippi. On condition that the Confederate soldiers should immediately disband and deposit their arms in the arsenals of their respective states, it provided that the state governments which submitted to the Federal authorities were to be recognized, and the people of the Confederacy guaranteed their political rights and franchises as citizens of the Union. These

[1] U. S. Grant, *Personal Memoirs*, vol. II, p. 489.

conditions went beyond the sphere of military action, and were clearly in advance of the general's authority, though he had some reason to believe that they would prove acceptable.[1] The government of Washington was, however, guilty of no act of bad faith when it repudiated them.

Undoubtedly it is the right, it may almost be called the duty, of the beaten commander to destroy as far as he can his stores, artillery, and instruments of warfare before he makes his surrender. Such destruction may go on during the negotiations, but it must cease the moment the agreement is concluded. The point was discussed in connection with the capitulation of Port Arthur in the Russo-Japanese War. General Stoessel destroyed warships, battle-flags, and some of the fortifications, before he gave up the place. But inasmuch as nothing of the kind was done after the signature of the capitulation at 9.45 A. M. on January 2, 1905, military honor was in no way violated. Japanese writers refrain from any accusation of disloyal conduct, and they regard the surrender as having been made in strict accordance with the laws of war.[2] All that the Hague code for land warfare says of capitulations is that they must "take into account the rules of military honor," and when once settled must be "scrupulously observed by both parties."[3]

§ 216

Lastly we must give a brief outline of the law of

*Truces and Armistices.*

Truces and Armistices.

They are temporary suspensions of hostilities over the whole or a portion of the field of warfare. There is some difference of opinion and usage as to the terms to be applied to them. An agreement to cease from active operations within a limited area, for a short time, and with the object of carrying out a definite purpose such as the

[1] W. T. Sherman, *Memoirs*, vol. II, ch. xxiii.

[2] Takahashi, *International Law applied to the Russo-Japanese War*, p. 210; Ariga, *La Guerre Russo-Japonaise*, p. 324.

[3] See Article 35.

burial of the dead, is generally called a *Suspension of Arms*, but it is also, and with equal propriety, termed an *Armistice*, the latter being the English usage.[1] A similar agreement, extending over a very long period and applying to the whole field of warfare, goes frequently by the name of a *Truce*. It amounts in fact to a peace, except that no treaty is drawn up. Such lengthy cessations of hostilities are unknown in modern warfare, but operations are often suspended for a time in order that negotiations may take place between the belligerents, either for a definite peace, or for the surrender of some place or force; and these rifts in the clouds of war are called indifferently *Truces* or *Armistices*. The chief, if not the only distinction between them, appears to be that the former is an older word than the latter, which has come into general use within the last hundred and fifty years. Every commander has power to conclude a special, partial, or local armistice with respect to the forces and places under his immediate control, but a general armistice covering the whole field of hostilities can be made only by commanders-in-chief or diplomatic representatives. Whether ratification by the supreme power in the state [can be regarded any longer as necessary is very doubtful, for there was none of any of the armistices at the end of the great war. Previous practice to the contrary was exemplified at] the end of the Russo-Japanese War in 1905, when the general armistice which preceded the peace was drawn up and signed by the plenipotentiaries engaged in negotiating the main treaty. After laying down a few conditions of universal application, they provided for special armistices for the various parts of the theatre of war. In accordance with this stipulation separate agreements, negotiated by the generals and admirals on the spot, were entered into for the Manchurian armies and the naval forces. The delegates for the forces confronting one another in Northern Korea were unable to agree, and the matter dragged on, fortunately without bloodshed, till the ratification

[1] Speeches of Generals Voigts-Rhetz, de Schönfeld, and Horsford at the Brussels Conference of 1874; see British State Papers, *Miscellaneous*, No. 1 (1875), p. 209; Holland, *The Laws of War on Land*, p. 50.

of the Treaty of Portsmouth rendered temporary arrangements unnecessary.[1]

The agreement for an armistice should contain clear announcements with regard to all matters as to which the intentions of the parties might be doubtful in the absence of specific declarations, such, for instance, as the exact day and hour when the armistice begins and ends, the exceptions, if any, from the rule that no hostilities are to be allowed while it lasts, the precise boundaries of the neutral zone that is generally interposed between the armies, and the preparations that may be allowed for continuing the contest if necessary. The terms used cannot be too precise, if dangerous disputes are to be avoided. In default of definite stipulations, we may extract a certain amount of guidance from the general rules of International Law. But the provisions of law-making documents do not cover the whole ground, and constantly require interpretation from usage, which is itself wanting in precision on several points. The Hague *Règlement*[2] lays down that as soon as an armistice is concluded it should be notified to all concerned, and adds that if no definite time has been fixed for the suspension of hostilities, they cease immediately after the notification. If the duration of the armistice has not been agreed upon, either belligerent may resume operations at any moment, provided that he gives clear and sufficient notice to his foe. The difficult subject of the kind and amount of intercourse which may be allowed during an armistice between the invaders and the population in the theatre of war, or between the inhabitants of an occupied territory and their fellow-subjects in adjacent unoccupied districts, should be settled in the terms of the armistice. When one side violates the armistice, the other has the right of denouncing it, "and even, in cases of urgency, of recommencing hostilities immediately." If, however, the breach of the conditions agreed upon is the act of unauthorized individuals, the side that suffers has no right to bring the arrangement to an end, but it may demand the pun-

[1] Takahashi, *International Law applied to the Russo-Japanese War*, pp. 219–224; Ariga, *La Guerre Russo-Japonaise*, pp. 548–562.

[2] See Articles 36–41.

ishment of the guilty parties and an indemnity for any losses it has sustained. [Some of the vessels of the German fleet surrendered under the armistice of November 11, 1918, were sunk by the German admiral in charge of them at Scapa Flow in 1919. Others which should have been surrendered were destroyed, and this called forth the protest of the powers through the President of the Peace Conference.][1]

There is a controversy whether during an armistice a belligerent may do, in the actual theatre of war, only such things as the enemy could not have prevented him from doing at the moment when active hostilities ceased, or whether he may do whatever is not forbidden expressly, except, of course, attack the enemy or advance further into his territory. The weight of authority is in favor of the former alternative; but the weight of reasoning seems on the side of the latter, which has the decisive support of recent practice.[2] Beyond the zone of active operations the parties may perform what acts of naval and military preparation they please. They can fit out ships, move troops, recruit armies, and, in short, act as if hostilities were still going on. There is, however, a dispute about the revictualling of a besieged place. This is a matter eminently fit for settlement by one of the articles of the armistice. Generally the besiegers are the stronger party and dictate their own terms, as the Germans did in 1871, when they would not allow Paris to receive any supplies during the armistice which preceded its surrender.

[1] [Fauchille, *Droit International Public*, vol. II, § 1258.]

[2] Oppenheim, *International Law*, vol. II, § 237; Despagnet, *Droit International Public*, §§ 564–565; Fauchille, *Droit International Public*, §§ 1253–1256; Hall, *International Law*, 7th ed., § 192.

## CHAPTER VIII

### PEACE AND THE MEANS OF PRESERVING PEACE

### § 217

War between civilized states is almost invariably ended by a treaty of peace. It has sometimes happened that the belligerents have exhausted themselves and tacitly ceased from further operations, but there are no recent instances of such a termination to hostilities in a struggle of any consequence, except the withdrawal of the French troops from Mexico in 1867 at the instigation of the United States. Wars may come to an end through the destruction of one of the communities engaged in them, as Poland was destroyed by the Third Partition, or as the Southern Confederacy fell after four years of strenuous conflict. In such cases no treaty is possible because there is no body politic left for the victory to treat with. Great Britain, however, strained a point in 1902 because of the special circumstances of the Boer War, and consented to negotiate with the leaders of the Boer commandoes still in the field against her, though the governments in whose name they waged war had ceased to govern, and no longer exercised any powers of sovereignty over definite territorial areas.[1] But when each of the belligerents preserves its political identity after the war, a treaty is drawn up embodying the conditions of peace. Sometimes two agreements prove necessary — a treaty embodying what are called the preliminaries, and a subsequent instrument called the definite treaty of peace. Warlike acts generally cease on the signature of the preliminary treaty, the provisions of which are adopted and extended in the definite treaty which takes its place. As a rule this document settles all the matters in dispute. But on rare occasions the difficulties of a settlement prove insuperable, and the parties content themselves with providing for the

The termination of war.

[1] "*Times*" *History of the War in South Africa*, ch. xxi.

restoration of peace and amity. This was the case with Great Britain and the United States in 1814, when the Treaty of Ghent terminated the war between them without solving any of the difficult questions which had originally caused it. Such a curious combination of a strong desire to terminate the struggle with an equally strong inability to agree upon a settlement of the points at issue is seldom found. Generally the causes of the quarrel are dealt with in the instrument which restores peace, and it contains in addition various stipulations concerning the new order of things which is to follow the termination of hostilities. Private rights are safeguarded, provision is made for the resumption of commercial intercourse, and legal matters of an international character receive due attention.

§ 218

The legal consequences of the restoration of peace.

The restoration of a state of peace carries with it certain consequences defined by International Law, and not dependent for their existence upon treaty stipulations, though they may be modified or set aside thereby. The moment a treaty of peace is signed belligerent rights cease. There must be no more fighting. Requisitions and contributions can be levied no longer by an occupying army, and arrears of them remaining unpaid cannot be demanded. The right to detain prisoners of war as such ceases, though convenience dictates that they shall remain under supervision till proper arrangements can be made for their return home, which should take place as soon as possible.[1] When the area of warfare is very large, and portions of it are too remote to be reached by quick modes of communication, it is usual to fix in the treaty a future date for the cessation of hostilities in those distant parts. But if official news of the restoration of peace reaches them before the time fixed, it seems to be settled that no further acts of war may be committed. The notification must, however, come from the government of a belligerent in order to be binding upon its commanders. They are under no obligation to take notice of information derived from any other source. This was clearly

[1] See Hague *Règlement*, Article 20.

laid down by the French Council of Prizes in the case of the *Swineherd*, a British ship captured in the Indian Ocean in 1801, within the five months fixed by the Treaty of Amiens for the termination of hostilities in those regions, but after the French privateer which made the capture had received news of the peace. The information was, however, English and Portuguese in its sources. No notification of an official character had been received from France, and the capture was therefore adjudged to be legal.[1] Captures made in ignorance after the conclusion of peace, or after the time fixed in the treaty for the termination of hostilities, must be restored, and the effects of all acts of war performed under similar circumstances must be undone as far as possible. [According to Japanese Prize Court decisions in 1905, in the absence of any special treaty or ordinance to the contrary, a Prize Court is entitled even after the conclusion of peace to adjudicate on captures made during the war, and, if need be, to condemn such property.[2] And there is a recent British decision to the same effect.[3] On the other hand, the Italian Prize Court in 1896 did not go so far as this; for, while it held that it had jurisdiction to try such a case, it nevertheless would not condemn the vessel on the ground that peace had been concluded. This view is illogical, for if the right of trial be conceded, it is not clear why it should be maimed in this fashion; and that there should be a right of trial seems to follow as a matter of course from the fact that it is impossible for a prize court to give its decision immediately the prize is taken.][4]

At the conclusion of peace those private rights which have been suspended during the war are revived, [subject, of course, to the provisions of the treaty of peace.][5] Thus in countries which give an enemy subject no right of admission to their courts, debts due from subjects of one of the powers lately belligerent to subjects of the other can again be sued for, and

[1] Snow, *Cases on International Law*, pp. 388, 389, note.

[2] [*The Australia. The Montara.* Russian and Japanese Prize Cases, vol. II, pp. 373, 403.] [3] [*The Rannveig.* L. R. [1922] A. C. 97.]

[4] [*The Doelwijk. Journal du Droit International Privé* (1897) vol. XXIV, pp. 268–296.] [5] [E.g., Part X, Sect. III–V, of Treaty of Versailles, 1919.]

contracts made before the war between private individuals on opposite sides in the struggle can be enforced at law. But specific performance cannot be demanded if any act done in furtherance of warlike operations, or as an incident of them, has rendered it impossible. A man, for instance, cannot be compelled to fulfil an agreement to sell a particular house or a particular herd of cattle, if the house has been battered to pieces in a siege or the cattle requisitioned and eaten by the enemy. [The effect of lapse of time on debts has been already considered.[1]]

As between the belligerent powers themselves, it is held that the conclusion of peace legalizes the state of possession existing at the moment, unless special stipulations to the contrary are contained in the treaty. This is called the principle of *uti possidetis*, and it is of wide and far-reaching application. Cities, districts, and provinces held in belligerent occupation by an enemy, fall to him by the title of conquest, when it is not expressly stated that they are to be evacuated. Captures from an enemy made at sea but not yet condemned by a Prize Court become the lawful possessions of the captor, and seizures on land of such things as a belligerent is allowed by the laws of war to appropriate are his by good title. It is very rarely desired that all these consequences should follow the conclusion of peace. The victor does not wish to acquire in perpetuity every post he holds when hostilities cease, nor does the vanquished intend to give up whatever territory may be at the moment in the hands of his adversary. Accordingly when one side has overrun large districts and captured many places, the treaty of peace almost invariably contains elaborate stipulations with regard to them. Their future destination is settled by express agreement, and detailed provisions are made for the regulation of proprietary and personal rights and obligations. Arrangements that seem at first sight to be pedantic in their minuteness are often necessary to carry out the intentions of the parties in the face of the rule that, when there are no express stipulations to the contrary, the principle of *uti possidetis* prevails.

[1] [See § 173.]

§ 219

Among the most extraordinary phenomena of modern times we may reckon the simultaneous growth of the material preparations for warfare and a sentiment of horror and reprobation of war. Both are apparent all over the civilized world.

The simultaneous growth of a horror of war and preparations for war.

The doctrine that nations cannot long retain the manly virtues of courage and endurance unless their populations are from time to time disciplined in the hard school of war is obviously false. In this age of self-indulgence and luxury those who wish well to their kind cannot too often repeat that the exclusive pursuit of weath and material comfort is dangerous and debasing. But it does not follow from this most wholesome truth that perpetual peace is a dream, and not even a beautiful dream. Peace does not necessarily mean sloth and luxury. Men can be manly without periodical resort to the occupation of mutual slaughter. It is not necessary to graduate in the school of arms in order to learn the hard lessons of duty and honor and self-sacrifice. No doubt the wealth which accumulates in time of peace may be abused for purposes of wanton self-indulgence. Ignoble ease has sometimes sapped the virility of nations. But has not war again and again turned the victors into human swine, and the vanquished into hunted wild beasts? No condition is without its pitfalls. But to guard against the moral dangers of peace by deliberately incurring the evils of war is like plunging into a furnace because fire has been known to have a purifying effect.

In the past war has often been a game which kings have played in the interests of personal or dynastic ambitions. With the advance of democracy it is passing more and more under the control of peoples. They are hardly likely to engage in it deliberately after cool calculation as a mere move in a deep political scheme, but they may be easily led into it through ignorance, or driven into it through resentment and fury. The best hope for the future lies in their enlightenment as to their true interests, and their moral improvement to the point of regarding every unnecessary conflict as at once a blunder and a crime.

War burdens are borne with more or less of cheerfulness to-day because they are regarded as insurances against worse evils. No important state dares to disarm lest its defenceless condition should tempt some unscrupulous neighbor to annex it, or at least to undermine its position in the world and make inroads on its wealth or territory. The truth is that in the last resort war is the only safeguard for what virile nations hold more dear than material prosperity — their independence, their honor, their position of influence in the world. And therefore war will endure, till overbearing and unscrupulous states are restrained by international tribunals and a strong international police force.

§ 220

International commissions of inquiry, and special mediation.

The increase of commercial and social intercourse among nations, the vast growth of sea-borne commerce, and the extreme mobility of capital, have combined to unify the interests of the civilized world in a way which would have been deemed impossible a century ago. At the same time the destructive power of weapons has become enormously greater than it ever was before, and earth and sea and air are all alike scenes of combat.

To combat ignorance that might lead to hostilities, the device of International Commissions of Enquiry was adopted by the first Convention of the Hague Conference of 1899. It laid down that such Commissions were expedient when international disputes arose from a difference of opinion on matters of fact, and provided that they might be constituted by special agreement between the parties. Failing this, each party was to appoint two members, and the four thus selected were to choose a fifth. The agreement to enquire was to define the fact or facts to be investigated and settle the procedure. The powers at variance were to afford the commissioners all the facilities necessary for a complete investigation. Their report was limited to a finding of fact, and expressly divested of the character of an arbitral award.[1] The Conference of 1907 amplified the scheme of its predecessor, especially

[1] See Articles 9–14.

in the matter of procedure. In this it followed to a great extent the rules adopted by the North Sea Commission, which sat in 1905 to determine whether Japanese torpedo boats were present among the British fishing smacks on the Dogger Bank when the Russian Baltic Fleet fired into them late at night on October 21. The appointment of this Commission had been due to the Convention of 1899, though the two powers had deliberately gone beyond its terms, and entrusted the commissioners with the duty of fixing the responsibility and apportioning the blame, in addition to ascertaining the truth about the disputed fact. The experience gained in this enquiry was placed at the disposal of the Hague Conference of 1907, and enabled it to make many improvements in the original scheme. It laid down in its first Convention that one only of the two members appointed by each party "can be its national or chosen from among the persons selected by it as members of the Permanent Court," the constitution of which will be described in the next section. In addition it made a number of new rules to deal with details or meet difficulties unforeseen in 1899. For instance, it provided for the filling up of vacancies on the Commission, the appointment of Assessors, and the use of the offices and staff of the International Bureau at the Hague. Moreover it gave power to prosecute enquiries in places other than the seat of the Commission with the permission of the state or states concerned and it pledged the governments of the signatory powers to give facility allowed by their laws for the collection of evidence and the summoning of witnesses.[1]

In order to eliminate as far as possible the element of passion the Hague Conferences magnified the office of mediator, and the initiative of Mr. Holls, the secretary of the American delegation, recommended the use of what it called special mediation.[2] A mediator is one who, either at the request of the powers at variance or on his own initiative, is entrusted with the duty of looking into the matters in dispute and endeavoring to devise some method of peaceful

[1] See Articles 9–36.

[2] Holls, *The Peace Conference at the Hague*, pp. 187–189.

settlement. His suggestions have no binding force. The principals in the quarrel are free to accept, reject, or modify them. The signatory powers at the Hague bound themselves to have recourse to mediation "as far as circumstances allow," and declared that an offer to mediate "can never be regarded by either of the parties at variance as an unfriendly act." They went on to suggest, under the head of special mediation, that in suitable cases each of the contending states should choose a friendly power, which should enter into communication with the power chosen by the other side with a view to composing the dispute. For this purpose thirty days, if necessary, are allowed, and during that period the principals are to enter into no direct communications with each other. It was hoped that in this way time would be gained for the passions of the contending states to cool, while unbiassed intellects examined the controversy and strove to settle it. The plan has had no formal trial as yet, but it seems so excellent that we may hope it would prove effective. The provisions concerning it, and ordinary mediation also, were embodied by the Conference of 1899 in its Convention for the Pacific Settlement of International Disputes, and reënacted by the Conference of 1907 with only a few verbal alterations.[1]

## § 221

Arbitration.

We now pass on to consider arbitration, the most important of the means of settling international quarrels without resort to war. Its value resides in its judicial or quasi-judicial character. It signifies the reference of the dispute to an individual, or small group of individuals, to whom the parties state their respective cases, and whose decision they are in honor bound to obey, and in fact have always obeyed, the only instance to the contrary being due to the fact that the arbitrator had exceeded his powers.[2] At present states are under no obligation to submit their disagreements to arbitration, unless they have

[1] See Articles 2–8.

[2] Lawrence, *International Problems and Hague Conferences*, pp. 81, 82.

entered beforehand into a treaty which binds them to do so. But the Hague Conference of 1907 applied to them something little short of compulsion as regards a particular kind of dispute. By the first article of its Convention concerning the recovery of contract debts the contracting powers agreed not to use armed force for such a purpose when the debts were due to their subjects from the government of another country, unless the debtor state refused to arbitrate, or after giving a nominal assent either rendered arbitration impossible or rejected the award. When a dispute is submitted to arbitration the matter takes on the semblance of a trial before a court, and the likeness grows as International Law becomes more fixed and determinate. Arbitral tribunals and arbitral procedure are rapidly developing at the present time; and the hope of those who desire to place the society of nations under a reign of law is that out of them will soon grow a High Court of Justice, charged with the exalted duty of deciding cases wherein states are suitors and international interests are the matters at stake.

Arbitration is no new thing. It has existed almost as long as war. But in the absence of a well developed code of International Law arbitral decisions were often based on purely political grounds or on considerations of general equity. Up to 1899 the parties had to construct their own tribunal on each occasion, after their minds had been inflamed by diplomatic controversy. It was clear that the prospects of peaceful settlement would be greatly improved by the existence of a standing tribunal ready at any time to take cognizance of cases submitted to it. The First Hague Conference supplied the need in part, and earned thereby a title to immortal fame. It established what was called the Permanent Court of Arbitration, with an International Bureau at the Hague to serve as record office and secretariat, and a Permanent Administrative Council to control the Bureau. To create the Permanent Court of Arbitration each signatory power was to select not more than four persons "of known competency in questions of International Law" and "of the highest moral reputation." Out of the list of possible judges thus brought into existence

the parties to a dispute might select the members of a tribunal to decide their difference, unless they preferred to constitute it in some other way by special arrangement between themselves. If they referred the dispute to the Hague Tribunal and disagreed over the choice of arbitrators, each of them was to appoint two, and the four thus chosen were to select an umpire, all five being chosen from the list before referred to.[1] The Conference of 1907 made many improvements in the scheme of its predecessor, while preserving the main features unaltered. The method of constituting an arbitral tribunal by selection from a panel of possible judges was retained, with the important addition that of the two arbitrators appointed by each party "one only can be its national, or chosen from among the persons selected by it as members of the Permanent Court." But the main additions were concerned with the regulation of procedure, and the *compromis*, or preliminary agreement defining the points at issue and making arrangements for the due conduct of the case. The parties are to draw it up by mutual agreement, but the Permanent Court is competent to settle it, if requested by them to do so. The request of one of them is sufficient in cases when the dispute falls within a general treaty of arbitration concluded by the powers concerned, or when it arises from contract debts as to which an offer of arbitration has been accepted by the recalcitrant power. Here we have something very like the summoning of an unwilling party before a tribunal, and though a loophole of escape is provided in both cases, the provision was significant of future developments.[2]

The Second Hague Conference not only revised and amplified the work of the First in the matter of international arbitration, but it also added provisions for summary procedure in disputes about matters of secondary importance. Each of the parties at variance is to appoint an arbitrator, and these two are to choose an umpire. If the two arbitrators are unable

[1] *Convention of 1899 for the Pacific Settlement of International Disputes*, Articles 20–57.

[2] *Convention of 1907 for the Pacific Settlement of International Disputes*, Articles 41–85.

to agree, each of them is to propose two candidates from the list of members of the Permanent Court "exclusive of the members appointed by either of the parties and not being nationals of either of them." From these four the umpire is chosen by lot. The tribunal of three thus formed tries the case. Normally the proceedings are to be in writing, but witnesses and experts may be called at the request of either side, if the court deems their examination necessary. Each party is to be represented by an agent, and oral explanations may be demanded from him at the discretion of the tribunal.[1]

It will be noticed that, though the panel of possible arbitrators brought into existence in 1899 is called the Permanent Court of Arbitration, strictly speaking it is not a court, but only a list from which courts can be formed as required. The Hague Conference of 1907 agreed with practical unanimity on the desirability of creating a really permanent court while retaining the existing system for use when desired. The new institution was designed to bear a close resemblance to the highest courts of civilized states, and be strong enough both in the learning, ability, and character of its members, and in the exalted position assigned to them, "to insure continuity in the jurisprudence of arbitration." Mainly on the vigorous initiative of the United States, backed by Great Britain, Germany, France, and Russia, a Convention was drawn up for the creation of *une Cour de Justice Arbitrale*, or Judicial Arbitration Court. The judges were to be appointed for twelve years, and were to receive an annual salary. Outside their own country they were to enjoy diplomatic privileges and immunities in the exercise of their functions. They were to meet in session at the Hague once a year, and were to appoint every year a special delegation of three of their number. These three were to perform various executive functions and were rendered competent to decide certain less important cases, and to settle the *compromis* in every case with the consent of the parties, and in some cases if the request was made by one party only. But the project was wrecked on the rock of the

[1] *Convention of 1907 for the Pacific Settlement of International Disputes*, Articles 86–90.

doctrine of equality. The South American Republics, headed by Brazil and supported by a few other powers, would be content with nothing less than an assignment to each state of the right to nominate a judge. This was impossible; and after several unsuccessful attempts at agreement further negotiation was abandoned, and the question left over for future settlement.[1]

On the motion of Sir Edward Fry, the first plenipotentiary of Great Britain, as much as possible of the wreckage was saved. The articles which embodied the results agreed on were included among the annexes to the Final Act of the Conference under the title of a "Draft Convention relative to the Creation of a Judicial Arbitration Court," and a wish was inserted in the Final Act to the effect that it was advisable to bring the draft Convention into force "as soon as an agreement has been reached respecting the selection of the judges and the constitution of the court." So the matter stood till in October, 1909, the government of the United States sent out a circular note, proposing that the functions of a High Court of Arbitral Justice should be conferred on the International Prize Court provided for by the twelfth Convention of the Hague Conference of 1907.[2] The object of Mr. Knox, the American Secretary of State, was to turn the flank of the difficulty as to the appointment of judges, which, it will be remembered, was overcome in connection with the International Prize Court by a most ingenious device.[3] [Fourteen awards were given by the Hague Permanent Court of Arbitration between 1902 and 1914. Then came the catastrophe of the great war, and when it ceased no effort was spared by

[1] Scott, *The Hague Peace Conferences*, vol. I, pp. 423–464; Higgins, *The Hague Peace Conferences*, pp. 498–517.

[2] *Supplement to the American Journal of International Law*, vol. II, pp. 102–114.

[3] See § 192. For the text of the first Hague Convention and the Draft Convention of 1907 for the creation of a Judicial Arbitration Court, see Higgins, *The Hague Peace Conferences*, pp. 100–179, 498–517; Scott, *The Hague Peace Conferences*, vol. II, 82–109; Whittuck, *International Documents*, pp. 17–23, 90–115, 220–228; *Supplement to the American Journal of International Law*, vol. II, pp. 43–81.

the advocates of arbitration to prevent its recurrence. So far, the fruits of their labors have been the creation of the League of Nations in 1919, and of the Permanent Court of International Justice in 1921. As this Court was the offspring of the League we must begin by describing the League. Brief reference to it as an international person has already been made.[1] The Treaty of Peace with Germany at Versailles, in 1919, opens with the Covenant of the League of Nations and this Covenant has been made an integral part of the succeeding treaties of peace (except those to which the United States is a party) with other belligerents. It was signed or adhered to by practically all the civilized powers of the world, except defeated Germany and her allies, and Russia. The United States did not ratify it. The League of Nations which it creates consists of the signatory powers and of states who acceded to it within two months. Other states may become members of it, if their admission is agreed to by two thirds of the Assembly (to which we refer below), provided that they give effective guarantees of their sincere intention to observe their international obligations, and that they accept the regulations of the League as to their armaments. Any member of the League may after two years' notice withdraw, but what may be called *renuntiatio callida* is prevented by the stipulation that it must have fulfilled its international and League obligations. Expulsion from the League is possible, if a state violates any covenant of the League.

The League works through an Assembly, a Council, and a Permanent Secretariat. The Assembly consists of representatives of members of the League and the rule is "one member, one vote," although it is possible for each member to have three representatives. The Assembly is to meet at stated intervals and may deal with any matter within the sphere of action of the League or affecting the peace of the world. The Council consists of representatives of the "principal allied and associated powers" (the British Empire, France, Italy, and Japan; the United States was included, but, as we have seen, did not ratify) and representatives of four other members

[1] [See § 43.]

of the League, these four members to be selected by the Assembly from time to time in its discretion. Until such selection, representatives of Belgium, Brazil, Greece, and Spain are members of the Council. It is obvious that the great powers must predominate in influence on the Council, though on voting strength they are collectively only equal in number to the representatives of the minor powers. If a majority of the Assembly approves, the Council may name additional members of the League whose representatives shall always be members of the Council, or may increase the number of the members of the League to be selected by the Assembly for representation on the Council. The Council must meet at least once a year, and each member has only one representative and one vote. Like the Assembly, it can deal with any matter within the sphere of action of the League, or affecting the peace of the world. Unless otherwise expressly provided, unanimity of all representatives is necessary, whether it be a decision of the Assembly or of the Council. A bare majority suffices on points of procedure. The Permanent Secretariat is established at Geneva, the seat of the League. Representatives of members of the League and its officials enjoy diplomatic privileges when engaged on its business, and its buildings and other property which it occupies are inviolable. So is that occupied by its officials or representatives.

Such are the composition and general functions of the League. How can it assist in maintaining the peace of the world? First of all, it undertakes to formulate plans for the limitation of armaments, and to revise these plans at least every ten years. Its members also agree to interchange full and frank information as to the scale of their armaments and their industries adaptable to creating them. A permanent Commission is to be constituted to advise on the execution of all the provisions to which we have referred and also on military, naval, and air questions generally. Next, the members of the League undertake to respect and preserve against external aggression the territorial integrity and existing political independence of one another. Nor is there any risk of stereotyping existing arrangements, for, by Article 19, the Assembly may from time to

time advise the reconsideration by members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world. Article 11 declares that any war or threat of war, whether immediately affecting any members of the League or not, is a matter of concern to the whole League, which shall take any action that may be deemed wise and effectual to safeguard the peace of nations; and that each member has the friendly right of calling the attention of the Assembly or of the Council to any circumstance affecting international relations which threatens to disturb international peace. Of the next five Articles, four deal with disputes likely to lead to rupture between the members themselves. They are to be submitted to arbitration or to inquiry by the Council and in no case is war to ensue until three months after the arbitral award or the Council's decision. Disputes which are expressly stated to be generally suitable for arbitration (and the list by no means professes to be exhaustive) are those as to (1) the interpretation of a treaty, (2) any question of International Law, (3) the existence of any fact which, if established, would constitute a breach of international obligation, and (4) the extent and nature of the reparation to be made for any such breach. Members must carry out in good faith any award, and are not to resort to war with a member that complies with it. If an award is not carried out, the Council is to propose steps by which effect shall be given to it. Article 14 puts forth plans for the establishment of a Permanent Court of International Justice, and to this we shall refer below. Article 15 deals with the procedure of the Council in settling disputes which are submitted to inquiry by it, in preference to arbitration. Article 16 is from a lawyer's point of view the most important in the whole Covenant. According to it, if any member of the League resort to war in disregard of its covenants relating to arbitration or inquiry by the Council, it shall *ipso facto* be deemed to have committed an act of war against all other members of the League, and they undertake immediately to sever all trade or financial relations with it, to prohibit all intercourse between its nationals and theirs,

and to prevent all financial, commercial or personal intercourse between its nationals and those of any other state, whether a member of the League or not. The Council must recommend to the several governments concerned what effective military, naval or air force the members shall contribute to the armed forces to be used to protect the Covenants of the League. There is also a stipulation for mutual support in the financial and economic measures to be taken. In the event of a dispute between a member of the League and a non-member, or between non-members, the latter shall be invited to accept the obligations of membership of the League for the purposes of such dispute, upon such conditions as the Council may deem just. If the invitation be refused and war resorted to, Article 16 is applicable against the non-member. If both parties to the dispute decline, the Council may take measures to settle the dispute. By Articles 20 and 21, all obligations or understandings inconsistent with the terms of the Covenant are abrogated, and future engagements inconsistent with it are not to be made; but "international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine,[1] for securing the maintenance of peace" are not affected. In October, 1921, the Assembly adopted amendments to some of the Articles of the Covenant. These are not binding until they are ratified in accordance with Article 26 of the Covenant.[2]

The benefits which the League of Nations confers on the cause of international peace are obvious from the summary which has been given above. The real advance which it makes on any other practical attempt to minimize the risk of war is the very powerful sanction created in Article 16. Something very like judgment of outlawry is pronounced on a state which, in breach of the obligations of the League, goes to war. The severance of all trade and financial relations and of all intercourse with the offender must be for most modern states as deadly as defeat in the field, and this excommunica-

[1] [See § 115.]

[2] [*League of Nations. Official Journal. Special Supplement* No. 6. October, 1921.]

tion, be it noted, is possible without firing a gun or mobilizing a soldier. On the other hand, the League is by no means perfect and, as matters stood, when it was framed, it was quite futile to expect that it would be. The gravest objection to it is that it is a League of many nations, but not of all nations, and it is particularly unfortunate that the United States did not become a member. Political and constitutional reasons make its absence intelligible, but none the less regrettable. It was certainly not due to any lack of enthusiasm for peace, as was proved by the excellent results achieved at the Washington Conference, 1921–1922. The United States were pioneers in this, and we refer to it later in this section. Russia was, and still is, too disorganized to be admitted to the League, and Germany and her allies were for obvious reasons excluded for the time being. However, the defect that the League is not all-embracing is one that need be merely temporary. There are also other objections, some real, some unreal. As to the former, there is none that cannot be eliminated with time and experience of the working of the League. Probably the only thing that will seriously endanger the practical usefulness of the League is indiscreet optimism. It is well rid of any adherent who imagines that its present object is to abolish war. This is just as rational as arguing that because violent criminals are a pest to society, violence itself should be forbidden and policemen abolished. The League not only has no such purpose in view, but actually recognizes war as one of the sanctions of its rules. What it does endeavor to do is to prevent unnecessary wars. In this section we are concerned rather with its preventive than with its constructive side. But the latter is quite as important as the former, for it includes duties with respect to territories under mandates,[1] improvement of labor conditions, traffic in arms and ammunition, and dangerous drugs, freedom of transit, and control of disease. In the three years of its existence, the League has done creditable work. The Saar Basin is under the administration of an International Commission of five members responsible to the League. The High Commissioner, who governs the Free

[1] [See § 43.]

City of Danzig and mediates between the Germans and Poles there, has been conspicuously successful. The Council settled a time-worn dispute between Sweden and Finland, as to the Aaland Islands, which were neutralized in a military sense by a Convention signed October 20th, 1921. The repatriation of prisoners of war was effected skilfully and cheaply. The difficult question of the Albanian frontier has been tackled. And in the autumn of 1921 came the severest ordeal which the League has yet had,—the task of devising some solution of the conflicting interests of the Poles and Germans in Upper Silesia. The Supreme Council of the Powers (a political body totally distinct from the League) had reached a complete deadlock, and a dangerous one, on this question, and in despair it was passed to the League of Nations which for once had the eyes of Europe upon it. Its decision may not have been an ideal one, but it is doubtful whether any better one was practicable, and it bridged over a perilous chasm in European politics.[1] Even greater than this achievement was the Protocol establishing the Permanent Court of International Justice, which was ratified in 1921. It was set up in accordance with Article 14 of the Covenant of the League of Nations, and is additional to the Court of Arbitration organized by the Hague Conferences of 1899 and 1907, and to the special arbitration tribunals to which states are always at liberty to submit their disputes for settlement. It consists of fifteen members (eleven judges and four deputy-judges, nine being a quorum) elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration as follows. Members of the League of Nations unrepresented in the Permanent Court of Arbitration draw up lists of candidates by means of national groups under the same

[1] [The literature on the League of Nations is voluminous. In addition to the League's official publications, the following references may prove useful. Sir G. G. Butler, *Handbook to the League of Nations*. Sir F. Pollock, *League of Nations*. Oppenheim, *League of Nations*, and *International Law*, vol. I §§ 167*a*–167*t*. Lawrence, *Society of Nations*. H. W. V. Temperley, *Second Year of the League*. *American Journal of International Law*, vol. XIV (1920), pp. 407–420. *British Year Book of International Law* (1921–1922), pp. 150–166.]

conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Hague Convention, 1907, for the settlement of international disputes. At least three months before the date of the election, the persons so appointed, and the members of the Court of Arbitration belonging to the states, who have signed or acceded to the Covenant of the League of Nations, are to be invited to nominate candidates for election. No group may nominate more than four persons. The Assembly and the Council then proceed independently of one another to elect the judges and deputy-judges. Candidates who obtain an absolute majority of votes in both bodies are regarded as elected. Articles 11 and 12 deal with possible deadlocks in the process of election. Members of the Court are elected for nine years and are capable of re-election. Vacancies are filled in the same way as in the first election. Ordinary members of the Court may not exercise any political or administrative function; deputy-judges may, except when performing their duties on the Court. Dismissal is only possible if the other members are unanimous that a member has ceased to fulfil the required conditions of his tenure. Members of the Court have diplomatic privileges and immunities. The Court elects its President and Vice-President for three years, and both may be re-elected. The seat of the Court is at the Hague, and unless it provides otherwise its session begins June 15 and continues until the cases on the list are finished. Special provisions exist as to the hearing of labour, transit, and communication cases. Judges of the nationality of a contesting party may nevertheless act. The League of Nations settles and pays the salaries of the members.

As to the competence of the Court, only states or members of the League of Nations can litigate before it, but subject to conditions prescribed by the Council other states may make use of it. As to the matters with which the Court can deal, they comprise all cases which the parties refer to it, and all matters specially provided for by treaties and conventions in force. There is a remarkable provision as to compulsory jurisdiction. By Article 36, states who are parties to the protocol may at any time declare that they recognize as

compulsory, *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in any dispute concerning (1) the interpretation of a treaty; (2) any question of International Law; (3) the existence of any fact which, if established, would constitute the breach of an international obligation.

What law is the Court to apply? This is stated in Article 38 as (1) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states. (2) International custom, as evidence of a general practice accepted as law. (3) The general principles of law recognized by civilized nations. (4) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law; but this is subject to the proviso that the decision of the Court itself has no binding force except between the parties and in respect of that particular case. The above rules do not prejudice the power of the court to decide a case *ex aequo et bono*, if the parties agree thereto.

As to procedure, the official languages of the Court are French and English. Parties are represented by agents, and may have counsel. The procedure consists of two parts, written and oral. The former is composed of communications to the judges and parties of cases, counter-cases and, if necessary, replies; and also of all papers and documents in support. The latter is the hearing by the Court of witnesses, experts, agents, and counsel, and is public unless the Court decides or the parties demand otherwise. The deliberations of the Court are in private and remain secret. Decisions are by majority, the President having a casting vote. There is no appeal against the judgment, which, however, may be revised by the Court itself if new facts come to light. Reasons must be given for the judgment, and dissenting judgments may be delivered. The decision has no binding force, except between the parties and in respect of that particular case. Each party bears its own costs unless the Court decides otherwise.

Such in bare outline is the Permanent Court of International Justice. It made several advances on the Permanent Court of

Arbitration at the Hague, for the latter was not really permanent, and was a court of arbitration, not of justice. The new Court has judicial powers, though arbitral powers are by no means excluded, for it can in effect confirm by judgment an agreement reached between the parties. Another step forward is what may be called the "compulsory jurisdiction clause" (Article 36). States which accept this practically agree with one another to accept the jurisdiction of the Court on any matter except one which is really political. Down to October, 1921, thirteen minor powers had accepted this clause, but no great power had done so.] [1]

The development of international arbitration since 1899 is one of the most wonderful signs of the times. [In addition to the great arbitral conventions which we have discussed, arbitral treaties] between two or more states have been negotiated, literally by scores.[2] The Great Powers of the world have been leaders in the movement, and the other states have joined in with celerity and good-will. As a rule the agreements are not confined to a few specified cases. Some of them contain mutual promises to refer all differences to arbitration; but the great majority reserve disputes which concern the vital interests or the independence and honor of the contracting parties. These phrases are vague and indefinite, and lend themselves to the purpose of any statesman who may desire to proceed to extremities. An interest becomes vital when a government chooses to consider it as such, and there is no fixed criterion of national honor. Reservations of this kind are probably useful at present, when arbitration on a large scale is a new thing, and there has not been time to see how it will work. But we may hope they will gradually disappear as arbitral jurisprudence develops and arbitral tribunals are formed which command universal respect. Meanwhile we may mention that in the Treaty of Karlstad of 1905 Sweden and Norway, after agreeing to refer to the Hague Tribunal all disputes which their diplomacy could not

[1] [H. W. V. Temperley. *The Second Year of the League* (1922). *British Year Book of International Law* (1921–1922), pp. 1–26.]

[2] For a list covering the period 1902–1908 see *American Journal of International Law*, vol. II, pp. 824–826.

settle, excepting only those which concerned their vital interests, left it to the court to decide whether such interests were really concerned in cases where they themselves came to different conclusions on the subject. Thus the only questions left beyond the pale of judicial proceedings were those which both parties regarded as so fundamental that they could not submit them to the judgment of impartial outsiders. Another significant advance, which it is impossible to leave unnoticed, has occurred in Latin-America, that laboratory of political experiments too little watched in Europe. In 1907 a Central American Peace Conference was held at Washington, and attended by the plenipotentiaries of Costa Rica, Guatemala, Honduras, Nicaragua, and Salvador, representatives of the United States being present at their deliberations. Among the Conventions negotiated at the Conference was one for the establishment of a Central American Court of Justice,[1] to which the five signatory powers bound themselves "to submit all controversies or questions which may arise among them, of whatsoever nature, and no matter what their origin may be, in case the respective Departments of Foreign Affairs should not have been able to reach an understanding." The court was constituted immediately, and was seized of its first case in the summer of 1908. Possibly it may become a permanent institution under the fostering care of the United States; but whatever its ultimate fate, the fact that it was created is both interesting and important. It affords additional evidence of the zeal for international arbitration which has distinguished the great American Republic during the whole course of its history. Great Britain fully shares this honorable attachment to a noble cause. In times when arbitration was not so popular as it is to-day the two countries decided some of the most dangerous of their quarrels by its means. They are now bound by a treaty of arbitration concluded for five years in 1908, [and renewed in 1913 and 1918 for further periods of five years].[2] [A Conference of powers at

[1] *Supplement to the American Journal of International Law*, vol. II, pp. 231–243.

[2] [*American Journal of International Law* vol. VIII, p. 342; vol. XII, p. 840.]

Washington in 1921–1922 achieved as one of several excellent results the Quadruple Pacific Treaty signed at that city December 13, 1921, by the United States, the British Empire, France, and Japan. In the Western hemisphere it is quite as important in the cause of peace as is the League of Nations in the Eastern hemisphere. The preamble of it states that its purpose is the preservation of the general peace and the maintenance of the rights of the signatory powers in relation to their insular possessions and dominions in the regions of the Pacific Ocean. The treaty then provides that (1) The parties to it will respect their rights in these possessions and dominions, and if any controversy between them shall arise out of any Pacific question, and involving these rights, which is not satisfactorily settled by diplomacy, they will invite the disputants to a joint conference to which the whole subject will be referred for adjustment. (2) If these rights are threatened by the aggressive action of any other power, the signatories shall communicate with one another fully and frankly in order to arrive at an understanding as to the most efficient measures for meeting the exigencies of the situation. (3) This agreement shall remain in force for ten years from the time it shall take effect, and thereafter shall continue in force until any party to it terminates it on twelve months' notice. The treaty was ratified by the United States, March 24, 1922, subject to a reservation.

It looks very much like a great "regional understanding" of the type referred to in Article 21 of the Covenant of the League of Nations, and at one stroke it supplies an anticipatory remedy for many dangerous possibilities of conflict between the parties to it and lessens the probability of attack by other powers. The signatories have effected a policy of insurance against conflagrations in the Pacific, whether they arise from internal accident or external incendiarism.] [1]

[1] [*Parliamentary Papers, Miscellaneous, No. 1 (1922)*, p. 38, Cmd. 1627. See also *Peace Handbooks*, vol. xxv, No. 160 for other schemes for maintaining general peace.]

# PART IV—THE LAW OF NEUTRALITY

## CHAPTER I

### THE NATURE AND HISTORY OF NEUTRALITY

§ 222

The definition of Neutrality. The varied elements which have gone to form its law.

NEUTRALITY may be defined as *The condition of those states which in time of war take no part in the contest, but continue pacific intercourse with the belligerents.*

The Law of Neutrality contains some of the oldest and some of the youngest chapters of our science. We have in it rules that have been observed for ages, and rules that have been developed in our own time. Some of its customs have gained authority from long usage, and some are even now shifting and uncertain. It sets forth principles that have been consecrated by general assent, and principles that are still warmly supported and fiercely decried. High ethical considerations have moulded some parts of it, while others have arisen from the conflict of opposing self-interests. Starting from small beginnings it has grown with the growth of the idea that peace and not war is the normal condition of mankind, till now it forms the most important, if not the largest, title of the international code. He who reads its pages aright will find therein the proof that, by making war difficult and neutrality easy, nations may be led to take that "true road to a perpetual peace" [1] which all lovers of humanity desire to see them tread.

Neutrality is in a sense the continuation of a previously existing state. By going to war belligerents alter their condition; but the powers who choose to be neutral have made no change. It might be thought, therefore, that their international rights were unchanged; and so far is this the

[1] Whewell, *Elements of Morality and Polity*, p. 611.

case that the legal presumption is in favor of identity and continuity. Unless proof to the contrary is shown, neutral states and their subjects are free to do in time of war between other states what they were free to do in time of universal peace. But International Law has affixed to the state of neutrality certain rights and obligations which do not exist when there is no war. For instance, neutral governments may regulate the delivery of certain articles to belligerent cruisers enjoying the hospitality of their ports. The supply of certain other articles they are bound to prohibit altogether. They have the right to enforce respect for the neutrality of their waters, and they are under an obligation not to allow their territory to be used for the fitting out or recruitment of armed expeditions in favor of either belligerent. Similarly the commerce of neutral individuals with the belligerents is subject to certain restrictions which do not exist in time of peace, and if they are disregarded the neutral trader is liable to severe penalties at the hand of the belligerent who suffers by his operations. These are but examples and indications of the altered legal conditions brought about by war even in the case of those who take no part in it. The whole Law of Neutrality is nothing more than the setting forth of these changes.

§ 223

The history of Neutrality.

The nations of classical antiquity had no names to signify what we mean by neutrality. The Romans spoke of neutrals as *medii*, *amici*, or *pacati*; and their vocabulary remained in use all through the Middle Ages. Grotius in the one short chapter which he gives to the matter refers to *medii*,[1] and Bynkershoek is obliged to coin the awkward phrase *non-hostes* when he wishes to be exact.[2] In the seventeenth century the terms *neutral* and *neutrality* occur in a Latin and a German dress as well as in English,[3] but they had to be adopted into the French lan-

[1] *De Jure Belli ac Pacis*, bk. III, ch. XVII, 3.

[2] *Quaestiones Juris Publici*, bk. I, ch. 9.

[3] Holland, Article on the *International Position of the Suez Canal* in the *Fortnightly Review* for July, 1883.

guage before their use became general. Vattel, writing in 1758, spoke of *neutre* and *neutralité;* [1] and in the following year Hübner published his *De la Saisie des Bâtements Neutres.* From that time the words became technical terms, and were used by all writers and speakers who had occasion to refer to the subject.

It might be inferred from the absence of a proper vocabulary of neutrality in the works of the early publicists that the thing itself was either unknown to them entirely or existed in a very rudimentary condition. The truth is that the Law of Neutrality is a comparatively modern growth, in so far as it deals with the mutual rights and duties of belligerent and neutral states. This part of it has arisen during the last three centuries from a recognition, dim at first but growing clearer and clearer as time went on, of the two principles of absolute impartiality on the part of neutrals and absolute respect for neutral sovereignty on the part of belligerents. But in so far as it deals with the right of belligerent states to put restraint on the commerce of neutral individuals, it is at least as old as the maritime codes of the Middle Ages, and in some of its provisions traces can be found of the sea laws of the Greeks and the Romans. Opposing self-interests are the operative forces which have determined the character of this part of the Law of Neutrality. At first the powers at war were able to impose hard conditions upon peaceful merchants. It was a favor for them to be allowed to trade at all, and they were not permitted to do anything that would impede the operations of the belligerents. Then, as commerce became stronger, concession after concession was won for neutral traders; and neutral states made common cause to protect their subjects from molestations they deemed unwarrantable. The nineteenth century saw the removal of many of the remaining shackles, and the process is still continuing. Its nature will be seen when we come to speak in detail of the rules of maritime capture as they affect neutral commerce. Meanwhile we will briefly trace the growth of a Law of Neutrality as between the states concerned in the war and the states which hold aloof from it.

[1] *Droit des Gens,* bk. III, ch. vii.

Grotius, like Machiavelli and other writers equally opposed to him in principles and modes of thought, assumes that the condition of neutrality is difficult and dangerous. He makes the neutral state into the judge of the justice or injustice of the war, and bids it "do nothing which may strengthen the side which has the worse cause, or which may impede the motions of him who is carrying on a just war." Only in "a doubtful case" is it exhorted "to act alike to both sides."[1] Where modern International Law insists on impartiality of conduct Grotius makes inequality of treatment a duty. He would determine a neutral's action by its views as to the rights and wrongs of the quarrel, whereas the modern doctrine is that the opinions and sympathies of non-combatant powers should have no effect on their behavior. They are bound to hold the balance equal between the parties to the conflict, however strongly they may desire the success of one of them and the defeat of the other. Neutral duties towards belligerents have grown enormously since the time of Grotius, and their development has not taken place along the exact lines laid down by him. A similar growth is observable in the corresponding department of belligerent duties towards neutrals. We must be content with a very brief survey of both processes.

Up to the middle of the seventeenth century it was necessary to bind states to neutrality by special treaty stipulations, in the absence of which a so-called neutral allowed one or the other of the belligerents to levy troops and fit out ships within its dominions, and sometimes furnished him with stores and munitions of war at the public expense.[2] After that time it began to be admitted that neutrality involved abstinence from open aid or encouragement to either belligerent. But an exception was made in the case of solemn promises of assistance made before the war. Grotius had gone so far as to declare that, even when two states were bound by a league, one of them might defend a third power from the attack of its ally without a general breach of the peace between them.[3] But the

[1] *De Jure Belli ac Pacis*, bk. III, ch. xvii, 3.
[2] Hall, *Rights and Duties of Neutrals*, pt. II, ch. i.
[3] *De Jure Belli ac Pacis*, bk. II, ch. xvi, 13.

accepted doctrine of the eighteenth century was not quite so broad. It laid down in the words of Vattel that "when a sovereign furnishes the succor due in virtue of a former defensive alliance, he does not associate himself in the war. Therefore he may fulfil his engagements and yet preserve an exact neutrality." The Swiss publicist goes on to say that "of this Europe affords frequent instances," and it is easy to collect a number of cases more than sufficient to make good his assertion. He himself refers to the action of the Dutch, who in the war of the Austrian Succession furnished Maria Theresa with subsidies and troops for use against France, with whom they remained at peace; and as this assistance was given under the provisions of a treaty made before the war and not in contemplation of it, the French Government did not complain until the forces of the United Provinces threatened its Alsatian frontier.[1] When such a definite and important state act as the despatch of fleets and armies was not held to be inconsistent with neutrality, we may well imagine that the lesser concessions of permission to levy recruits or purchase and equip vessels of war were deemed perfectly innocent. Very often indeed leave was taken without the ceremony of asking for it, as, for instance, by Frederick the Great, who in the Seven Years' War cared not where he obtained his soldiers as long as the ranks were full. But towards the close of the century moral ideas outran practice and writers who were abreast of the best opinion of their day began to condemn the license of which we have been speaking. Thus G. F. de Martens maintained that a state which sent troops to assist one of the belligerents could not in strictness demand to be looked upon as a neutral, though he allows that it would be generally regarded as such when the treaty under which it gave the aid was made before the war.[2] The year in which he wrote witnessed the last example of the practice he condemned. In 1788 Denmark furnished limited succor to Russia, then at war with Sweden. Though she was bound by previously existing treaties to do so, her conduct was made the subject of protest by the power

[1] *Droit des Gens*, bk. III, §§ 101, 105.

[2] *Précis du Droit des Gens Moderne*, §§ 264, 265.

which suffered in consequence of it, and had not the war been brought to a speedy termination, she would probably have been made a party to it.[1]

When neutrals were allowed to ignore in act the principle of impartiality they loudly asserted in words, it is not to be wondered at that the obligation to respect the sovereignty and territorial integrity of neutral states sat lightly on belligerent powers. The elementary duty of refraining from hostile operations in neutral territory was frequently violated. Grotius admits that many liberties were often taken with those who refrained from engaging in a war, and advises them to make a convention with each of the belligerents so that they may be allowed with the good-will of both to abstain from hostilities.[2] Indeed, there seems to have been an idea abroad during his time that a neutral state must be either weak or mean-spirited. In the first case its territory might be violated with safety, and in the second it was deemed to have received a useful lesson when a powerful neighbor made it suffer in spite of its determination to incur no risks. Certain it is that violations of neutral territory on the part of belligerents were of constant occurrence.[3] In 1639, for instance, a Spanish fleet was destroyed in the Downs, which are English territorial waters, by the Dutch Admiral Tromp, after negotiations which did little honor to the good faith of Charles I,[4] and in 1665 the English returned the compliment by attempting to seize a Dutch squadron in the neutral harbor of Bergen. It is generally alleged, and probably with truth, that a considerable improvement took place in the next century. But in 1737 Bynkershoek maintained that it was lawful for a belligerent to pursue an enemy's vessel into neutral waters, and complete the capture there *dum fervet opus*.[5] Fortunately this rule has never won general acceptance, and it may be considered as bad in law, though it has sometimes been quoted to justify high-handed action on the part of powerful belligerents.

[1] Wheaton, *International Law*, § 424; Phillimore, *International Law*, pt. IX, ch. ix. [2] *De Jure Belli ac Pacis*, bk. III, ch. xvii, 1 and 3.

[3] Hall, *Rights and Duties of Neutrals*, pp. 33–35.

[4] Gardiner, *History of England*, vol. IX, pp. 60–68.

[5] *Quæstiones Juris Publici*, bk. I, ch. 8.

In matters connected with neutrality state action was halting and uncertain till the close of the eighteenth century. Lip service was rendered to the two great principles of impartiality on the part of neutral powers and respect for neutral sovereignty on the part of belligerents, but both of them were frequently ignored in practice. Even when governments acted towards one another with perfect loyalty, they made little attempt to restrain the vagaries of their subjects, who might with impunity give direct assistance to either side and use neutral territory as a base of warlike operations. This unsatisfactory condition of affairs was permanently improved owing to the action of the United States in the war which broke out in 1793 between Great Britain and Revolutionary France. M. Genêt, the French minister accredited to the American Republic, caused French privateers to be fitted out in American ports and despatched therefrom to prey upon British commerce. He also set up Prize Courts in connection with French consulates in the United States; and these courts tried and condemned British vessels which had been captured by French cruisers and brought into American waters. Great Britain complained of these acts as injurious to her own commerce as well as derogatory to the sovereignty of the United States; and Washington's administration took the ground that by the law of nations all judicial functions within a country must be exercised by its own courts acting under the authority of its government. Jefferson, therefore, as Secretary of State, wrote to M. Genêt on June 5, 1793, "that it is the right of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the duty of a neutral nation to prohibit such as would injure one of the warring powers."[1] He had previously admitted to Great Britain the obligation of the United States to prevent the commissioning, equipping, and manning of vessels in her ports to cruise against either belligerent. Washington did his utmost, in spite of a hostile public opinion and a defective condition of the law, to enforce respect for the principles his government had laid down.[2] He ordered the col-

[1] Wharton, *International Law of the United States*, § 398.

[2] See §§ 126, 188.

lectors of customs throughout the Union to prevent the original arming and equipping of cruisers destined for belligerent service and the subsequent equipment of vessels solely adapted to warlike uses. No enlistments were to be permitted on board a belligerent vessel enjoying the hospitality of American ports, unless the recruits were subjects of the power which owned the ship, and not inhabitants of the United States. M. Genêt not only paid no heed to remonstrances, but endeavored to stir up opposition to the administration. His recall was therefore demanded; and the first great triumph of the American Government in its policy of strict and honest neutrality was won when the French Republic ended the diplomatic career of its representative, and instructed his successor to disarm the privateers which had been fitted out in the United States and remove the consuls who had taken part in the proceedings of the so-called Consular Prize Courts. In 1794 Congress forbade American citizens to enlist in the army or navy of a foreign state, and prohibited other acts in defiance of the neutrality of the United States. It also gave the President the right to use the army and navy to prevent the departure from American jurisdiction of vessels offending against the Act. In 1818 the whole law on the subject of neutrality was codified and embodied in the great Foreign Enlistment Act, which is still in force. By this statute citizens of the United States are prohibited from serving in war against any foreign state with which the United States are at peace; and a variety of acts are made criminal, among the chief of which are fitting out or arming any vessel within American jurisdiction with the intent that it shall be employed as a belligerent cruiser in a war in which the United States is neutral, increasing within the United States the warlike force of any cruiser so employed, and setting on foot in the territory or territorial waters of the Union armed expeditions against any country with which the United States is at peace.[1]

These proceedings of the United States from 1793 to 1818

[1] For an account of the efforts of Washington's government to preserve an honest neutrality, see Wheaton, *International Law* (Dana's ed.), note 215, and Moore, *International Law Digest*, vol. VII, pp. 886–894.

mark an era in the development of the rights and obligations of neutral powers. In 1819 Great Britain adopted a neutrality statute based avowedly upon the act passed by Congress in the previous year; and in 1870, after her experience of the weakness of her law in dealing with the *Alabama* and other Confederate cruisers, she strengthened it by a new and more stringent Foreign Enlistment Act, which in several particulars goes beyond the American law in severity. The neutrality regulations of other civilized states are drawn on similar lines, though they differ considerably from one another in their prohibitions and permissions. It is necessary in view of certain modern proposals to remark that the obligations placed on neutrals must not be made too burdensome, lest they should find war less irksome than peace. When we come to consider in detail the duties of neutral governments, we shall be in a position to appreciate the necessity of this warning.

§ 224

Neutrality and Neutralization. The correct meaning of the latter.

The older text-writers divided neutrality into two kinds. The first, called perfect neutrality, was simply that which we now understand by the term neutrality. It was the condition of states who took no part in the contest, but remained on friendly terms with both sides. The second, called imperfect or qualified neutrality, occurred when a neutral state gave either active aid or special privileges to one of the belligerents under the provisions of a treaty made before the war and not in anticipation of it. It is hardly necessary to say, after the historical view we have just concluded, that the latter is no longer recognized. Even the benevolent neutrality which we sometimes hear of is an abuse, if it means allowing to one side privileges denied to the other.

But though neutrality is legally one and the same in all cases it must be carefully distinguished from neutralization. In the former there are the elements of abstention from acts of war, and freedom to abstain or not to abstain at pleasure. In the latter the first element remains the same; but instead of the second we find either an obligation not to fight except in

the strictest self-defence, or an obligation to abstain from warlike use of certain places and things which have had the neutral character stamped on them by international agreement. We see, therefore, that enforced neutrality is the essence of neutralization. This condition has been imposed on states, on provinces, and on waterways, and it effects so great a change in their legal position that in strictness it cannot be made without the consent of all the parties affected thereby. A power is incapable of neutralizing its own territory by its own mere declaration, because the rights and duties of other powers, as conferred and imposed by International Law, would be considerably altered thereby. Similarly two or three powers cannot neutralize the territory of one of their number; for they have no authority to legislate for the civilized world, and warn other powers off a spot where belligerent operations could previously be carried on by all who chose to go to war with the state which owned it. The common law of nations cannot be overridden by one of the communities subject to it, or by a small group of them. A change of status, if it is to be internationally valid, must be the result of general agreement. At the very least it must be accepted by all the important states concerned in the matter, and it should be remembered that their consent can be given by tacit acquiescence as well as by formal stipulations.

Unfortunately the word *neutralization* and kindred terms have occasionally been used in a loose and inaccurate sense in treaties and other international documents. Rivers that have been opened to the peaceful commerce of the world, straits and seas on the shores of which each of two contracting parties has bound itself not to erect fortifications, have been spoken of as neutralized; while an arrangement whereby a powerful state has undertaken to assist a weak neighbor in defending from attack an important waterway has been declared to amount to a valid and complete neutralization.[1] Precision of statement and cogency of reasoning are impossible unless the words used have a clear and recognized meaning

[1] For instances see Lawrence, *Essays on International Law* (2d ed.), pp. 142–156.

attached to them. If the terms and phrases we are considering were never written or spoken save in the sense that our analysis shows to belong to them, more than one international dispute would disappear for lack of material to sustain it. It is fortunate that when in 1817 the United States and Great Britain restricted by mutual agreement the naval force each was to maintain on the Great Lakes[1] they did not attempt to dignify a small and sensible restraint on their sovereign rights with the high-sounding name of neutralization. It would have been better if the same reticence had been observed by other powers in similar cases.

§ 225

Neutralized states.

The chief existing instances of undoubted neutralization give the support of history and practice to the doctrines we have arrived at by reasoning from general principles. We will begin with a consideration of the case of neutralized states. There is at the present time one European power, Switzerland, which occupies a position of guaranteed and permanent neutrality, but on condition that it refrains from all belligerent operations save such as are necessary to protect it from actual or threatened attack. The Swiss Confederation succeeded in maintaining both its independence and its neutrality from the Peace of Westphalia to the French Revolution; but in the stormy times which followed it was torn by internal dissensions and its territory was frequently invaded by French, Austrian, and Russian armies. After the final overthrow of Napoleon a declaration was signed at Paris on November 20, 1815, by the representatives of Great Britain, Austria, France, Prussia, and Russia, whereby they formally recognized the perpetual neutrality of Switzerland, and guaranteed the inviolability of its territory within the limits established by the Congress of Vienna.[2] The agreement of the five Great Powers of Europe was held to be sufficient to elevate the neutralization of Switzerland into a principle of the public law of Europe, and its sancity is none the

[1] *Treaties of the United States*, pp. 413–415.

[2] Wheaton, *History of the Law of Nations*, pt. IV, § 17.

less real because the Swiss people have shown themselves resolved to defend the integrity of their frontiers by a well-armed and organized national levy. No case of violation of their territory has occurred since 1815. The political advantages of its isolation from warlike operations are so manifest, that none of the neighboring states is likely to venture upon invasion, with the certainty before it of encountering a desperate resistance from the inhabitants and bringing about the armed intervention of some of the guaranteeing powers.

[Two other European states were formerly neutralized, but ceased to be so by the Treaty of Versailles, 1919.[1] They were Belgium and Luxemburg. A brief account of their status prior to the Treaty is given here.] Belgium was united with Holland by the Congress of Vienna, and the two together were known as the Kingdom of the Netherlands. But in 1830 the Belgians rose in revolt against the House of Orange. The King of the Netherlands requested the mediation of the Great Powers of Europe; but to his disgust they insisted upon intervention. In a long series of negotiations, diversified by a French attack on the citadel of Antwerp and an English blockade of the Scheldt, the Belgian frontiers were defined, and Belgium was erected into a separate kingdom whose perpetual neutrality was guaranteed by the powers. These arrangements were embodied in a great international treaty signed in November, 1831; but Belgium and Holland did not come to terms till April, 1839. Their agreement was confirmed by the five Great Powers in another treaty of the same date, which repeated the guarantee of the independence and neutrality of the Belgian Kingdom, and bound it to refrain from interference in the armed struggles of other states.[2] This obligation it loyally fulfilled; and [it made a heroic defence against the German invasion, in 1914. This was one of the first of Germany's breaches of its international engagements in the great war, and

[1] [Articles 31, 49.]

[2] Wheaton, *History of the Law of Nations*, pt. IV, § 26; Fyffe, *Modern Europe*, vol. II, pp. 381–390; Hertslet, *Map of Europe by Treaty*, vol. II, pp. 859–884, 996–998.

led to the entry of Great Britain into it in fulfilment of her duties towards Belgium.] [1]

The strictness, with which its duty of taking no part in the quarrels of other powers was construed, was very well illustrated in the course of the negotiations which terminated in the [now extinct] neutralization of Luxemburg. In the general settlement of Europe after the downfall of the first Napoleon, the Grand Duchy had been added to the dominions of the King of Holland as a separate and independent state, and made into a member of the German Confederation. As such its capital was garrisoned by Prussian troops, who remained after the disruption of the Confederation in 1866. France objected to their presence, and threatened war if they were not removed. The question was settled by a Conference, which met at London in May, 1867, and placed the Grand Duchy under the collective guarantee of the powers as a permanently neutralized territory. Prussia was to withdraw its soldiers, and the fortifications of the city were to be demolished. Belgium, as one of the states immediately concerned, took part in the Conference and assented to the conclusions arrived at by the assembled plenipotentiaries, but did not sign the treaty in which they were embodied. It contained a guarantee of the neutrality of Luxemburg; and Belgium, being itself a permanently neutralized state, was regarded as incapable of entering into an engagement which might involve her in war for other purposes than those of the strictest self-defence.[2] This important indication of the nature and extent of the obligations attached to a neutralized state by the public law of Europe renders the Conference of London memorable from the point of view of the jurist. But it also possesses a further title to his regard. The five Great Powers agreed to invite Italy to join them in sending representatives to deal with the matters under consideration. Their invitation was held to raise her to the rank of a Great Power. She has acted as such on all subsequent occasions;

[1] [Garner, *International Law and the World War*, vol. II, ch. XXVIII. De Visscher, *Belgium's Case* (1916).]

[2] Fyffe, *Modern Europe*, vol. III, p. 402; Hertslet, *Map of Europe by Treaty*, vol. III, p. 1803.

and her elevation seems to show that among the functions of primacy performed by the Great Powers [1] must be reckoned the addition of fresh states to their number by a process of co-option. The political order established by the Conference of 1867 remained in existence [until 1919]. On the death of the King of Holland in 1890, and the accession of his daughter to the Dutch throne, Luxemburg passed under the rule of Duke Adolph of Nassau, since by its constitution a female was incapable of reigning. But the dissolution of what was a purely personal tie has made no difference in the neutralized condition of the little state. Its population sympathized largely with the French in the war of 1870, and were accused by Prince Bismarck of aiding them in various ways inconsistent with true neutrality. His threat to disregard the integrity of the Duchy was, however, never carried into effect. Probably it fulfilled its purpose by calling the attention of the authorities and the people to the tenure on which they held their exceptional position.[2] [The neutralization of Luxemburg, like that of Belgium, was inexcusably violated by Germany in 1914.] [3]

§ 226

Neutralized portions of unneutralized states.

We have now to deal with neutralized provinces, by which phrase we mean neutralized portions of states that are free to make war at pleasure. The most conspicuous instance [was, until 1919] that of Savoy, which was neutralized in 1815 by the treaties of Vienna and Paris, and made to "form a part of the neutrality of Switzerland." Savoy then belonged to Sardinia, and it was stipulated that if the neighboring powers were at war the province should be evacuated by Sardinian soldiers and garrisoned for the time being by the neutral troops of Switzerland. When in 1860 Savoy was ceded to France, both Switzerland and the Great Powers declared that the original engagement of neutrality was given in the interests of all the parties to the treaties of 1815, and argued that if the province were

[1] See § 113.

[2] Amos, *Political and Legal Remedies for War*, pp. 222, 223.

[3] [Garner, *International Law and the World War*, vol. II, §§ 453–459.]

united to a great military state like France, there could be little or no security for the continuance of the special condition imposed upon it. France and Sardinia on the other hand contended that the neutrality guaranteed to Savoy was in favor of Sardinia only; but they were willing to agree that France, as successor to Sardinia, should fulfil the obligations arising out of it.[1] No solution of the difficulty by general consent was reached at the time; but when in 1883 the Federal Council of Switzerland complained of the commencement of fortifications by France on the neutralized territory and not far from the city of Geneva, the government of the French Republic recognized the justice of the Swiss remonstrance and ordered the works to be discontinued.[2] It is clear, therefore, that some limitation upon the ordinary rights of sovereignty was accepted by France as a condition of its tenure of Savoy. Yet it is impossible to say how far that limitation extended, and what amount of recognition of Savoyard neutrality could have been asked of a power which was engaged in warfare with France. The government of the Republic was free to obtain conscripts from the population of the province supposed to be neutralized, and to levy therein extraordinary taxes for the purpose of supporting the war. It would not be obliged to evacuate the territory and allow Swiss troops to hold it during hostilities; for nothing of the kind was done in the course of the great struggles with Germany in 1870 [and 1914–1918]. But if France were free to use all the resources of Savoy for warlike purposes, it is hardly likely that the enemies of France would have abstained from attacking Savoyard territory if they had thought themselves likely to gain any military advantage from invasion. No German troops attempted to penetrate into it during the wars of 1870–1871 [and 1914–1918]; but the strategy of their leaders did not include military operations so far to the south. Had the plan of their campaign required it, they would probably have entered the province without hesitation; and it is difficult to

[1] Amos, *Political and Legal Remedies for War*, pp. 217–218; Wheaton, *International Law* (Dana's ed.), note 202.

[2] *Annual Register for 1883*, pp. 269, 270.

believe that Italian strategists would have allowed their calculations of the chances of invasion to be altered in any way by the shadowy neutrality of a portion of the frontier between Italy and her northwestern neighbor. [These speculations are now beyond solution so far as Savoy is concerned, for its neutralized zone ceased to be such by the Treaty of Versailles, 1919.][1] But considerations of a similar kind apply to Corfu and Paxo, two of the Ionian Islands, which were formally neutralized by the Great Powers when the group to which they belonged was handed over to Greece in 1864. The King of Greece engaged "to maintain such neutrality." [2] His obligations are nowhere expressed in more definite phraseology, and it is obvious that they are as vague as words can make them. The Greek Government draws men and supplies from these islands, as from other portions of its dominions; and, that being the case, justice appears to demand that a power at war with Greece should be free to attack and occupy them. When a whole state has been neutralized its rights and obligations are clear; but legal ingenuity fails before the attempt to define the immunities and duties of a neutralized part of a non-neutralized whole. Its position is anomalous to the last degree. We may rest assured that such an artificial arrangement will not stand the strain of a serious war. [In January, 1916, French troops made Corfu the headquarters of the Serbian army, in spite of the protests of Germany and Austria that this infringed the neutralization of the island. The defence was that, on the score of humanity, a portion of the Serbian army needed rest and recuperation in some neutral place with adequate sanitary facilities and food supply. Any intent to occupy the island for military purposes was disclaimed. This can scarcely be described as a satisfactory plea. Another defence was that Austrian and German submarines were using the island as a base of hostile operations, and that the occupation was a precautionary measure against a repetition of this. Perhaps the best way of judging the incident is to take it, not as an isolated event, but as one of the circumstances

[1] [Article 435, and Annexes thereto.]

[2] Holland, *European Concert in the Eastern Question*, pp. 45–54.

in the anomalous intervention in Greece, which has already been discussed.] [1]

Some perception of the difficulties we have indicated seems to have influenced the powers assembled in the West African Congress of Berlin, when they discussed the question of the neutrality of the territories comprised in the conventional basin of the Congo, some of which belong to various European states. Mr. Kasson, the American plenipotentiary, proposed that the districts in question should be permanently neutralized under the guarantee of the signatory powers. But though the project bought forward by him received weighty support, the Congress finally decided against it, on the ground that a belligerent state could not be required to deprive itself of a part of its means of action, or to refrain from using a portion of its dominions. The representative of the United States pointed out that the development of America in the colonial epoch had been greatly retarded by wars between the European powers who held territorial possessions within it, and declared that his proposition was formulated with a view to saving Africa from similar calamities. The object of the American Government met with general concurrence, and an attempt was made to realize it in the Final Act of the Conference, which was signed on Feb. 26, 1885. The eleventh article provided that "in case a power exercising rights of sovereignty or protectorate in the countries mentioned in Article 1, and placed under the free-trade system, shall be involved in a war, then the High Signatory Parties to the present Act, and those who shall hereafter adopt it, bind themselves to lend their good offices in order that the territories belonging to this power and comprised in the conventional free-trade zone, shall, by the common consent of this power and the other belligerent or belligerents, be placed during the war under the rule of neutrality, and considered as belonging to a non-belligerent state, the belligerents henceforth abstaining from extending hostilities to the territories thus neutral-

[1] [See § 64. Cf. Garner, *International Law and the World War*, vol. II, § 464.]

ized, and from using them as a base for warlike operations." [This Article was not repeated in the Convention of September 10, 1919, which some of the powers substituted for the Final Act of 1885.][1]

[The Aaland Islands, a small group in the Gulf of Finland between the coasts of Sweden and Finland, were disarmed and neutralized by a Convention signed at Geneva on October 20, 1921. By the Peace of Fredrikshamn, 1809, they and Finland had been taken away from Sweden by Russia and amalgamated in the autonomous Grand Duchy of Finland, which seceded from Russia in 1917, taking the Islands with her. The inhabitants are practically all Swedish, and, although the Convention of Geneva assigns them to Finland, the preservation of the Swedish language, culture, and local traditions is guaranteed. This settlement of a long dispute was due to the League of Nations, and Sweden loyally accepted it, though she was dissatisfied with it.][2]

## § 227

Neutralized waterways.

Seas and straits could be neutralized as well as territory, if all the maritime powers, or even the leading ones among them, together with all others specially interested in the area in question, agreed to refrain from naval hostilities within it and enforce a similar abstention on recalcitrant states. No such neutralization has been definitely effected except in the cases of [the Bosphorus and Dardanelles and] the Suez Canal. But we have seen that the Panama Canal may become a neutralized waterway when we considered the Law of Peace.[3] The rules for its navigation contained in the treaty between Great Britain and the United States which enacted them, are practically the same as those already accepted by all civilized powers either ex-

[1] [See § 52], and *Protocols and General Act of the West African Conference*, in British Parliamentary Papers, *Africa*, No. 4 (1885), pp. 146–149, 183–185, 256–258, 307.

[2] [H. W. V. Temperley, *Second Year of the League* (1922), pp. 28–29. *British Year Book of International Law* (1921–1922), p. 159.]

[3] See §§ 89, 90.

pressly or tacitly for the Suez Canal. Moreover, the United States, to whom control has been committed, is both able and willing to enforce the provisions which forbid warlike operations in the canal or its approaches. These special circumstances justify the conclusion that, as no important power or group of powers has challenged the arrangements [which in strictness are limited to Great Britain and the United States, the Panama Canal will soon be, if it has not already been, neutralized by the joint effect of these arrangements and of the tacit consent of other powers.] As regards the Suez Canal, the Convention of 1888, which imposed on it and its approaches a permanently neutral character, was signed by the six Great Powers of Europe, together with Turkey, Spain, and the Netherlands. Moreover, its sixteenth article contained a stipulation that other powers should be invited to accede to it. It bore, therefore, from the first the character of a great international act, and has had that quality more deeply impressed on it as time went on by the tacit if not the express consent of the civilized world. It is this alone that has given to the canal a definite status and settled its position in International Law. In 1856 the Khedive Said, in a concession to M. de Lesseps, declared that the canal and its ports should always be open as neutral passages to all ships of commerce.[1] This unilateral statement was invoked by the great French engineer in 1882, in support of his contention that the British, in seizing the canal and making it the base of their operations in Egypt, were guilty of unlawful interference with a neutralized waterway. But he stood almost alone in the view he took of their proceedings. His protests were disregarded by statesmen, who began soon after they were made the long and intricate series of negotiations which led to the Convention of 1888. It is obvious that, had the canal been already neutralized, it would not have been necessary to spend five or six years on the discussion of plans for imposing a neutral character upon it.

[1] British Parliamentary Papers, *Egypt*, No. 23 (1883), p. 6.

§ 228

The divisions of the Law of Neutrality.

One of the most important distinctions in the whole range of International Law is that between the two senses of the word *neutral* when used as a substantive. It may mean either a neutral state or an individual who is a subject and citizen of a neutral state. The rights and obligations of the former differ widely from those of the latter. In order to keep them separate we must make a distinction at the outset between the two great divisions into which the whole Law of Neutrality naturally falls. They are

I. Rights and obligations as between Belligerent States and Neutral States.

II. Rights and obligations as between Belligerent States and Neutral Individuals.

The distinction has only to be stated in order to be recognized as just and necessary. A neutral state has many rights against a belligerent which from the nature of the case a neutral individual cannot have, and is under many obligations from which a neutral individual is free. On the other hand the neutral individual may do many acts which the neutral state may not do, and is subjected to many interferences from which the neutral state is free. And just as the rights and obligations differ in the two cases, so also do the remedies. When state wrongs state, the remedy is international; but when a neutral individual indulges in conduct which a belligerent has a right to prevent, the injured government strikes directly at him and punishes him in its own courts. The neutral state of which he is a subject has nothing to do with the matter, unless the belligerent attempts to punish for acts deemed innocent by International Law or to inflict severer penalties than its rules allow. As we consider in detail the rights and obligations of neutrality, the distinction we have just drawn in outline will become fully apparent.

Our two main divisions work out into a variety of subordinate heads, each of which will be dealt with in a separate chapter. The following table shows in a graphic manner the way in which we propose to arrange the subject.

- I. Law of Neutrality as between State and State.
  - (1) Duties of a Belligerent State towards Neutral States.
  - (2) Duties of a Neutral State towards Belligerent States.
- II. Law of Neutrality as between States and individuals.
  - (1) Ordinary Neutral Commerce.
  - (2) Blockade.
  - (3) Contraband Trade.
  - (4) Unneutral Service.

## CHAPTER II

### THE DUTIES OF BELLIGERENT STATES TOWARDS NEUTRAL STATES

### § 229

The law of nations defines with a fair amount of clearness the obligations of belligerent states in their dealings with those of their neighbors who remain neutral in the contest. The first and most important of their duties in this connection is

*To refrain from carrying on hostilities within neutral territory.*

We have already seen that, though this obligation was recognized in theory during the infancy of International Law, it was often very imperfectly observed in practice.[1] But in modern times it has been strictly enforced, and any state which knowingly ordered warlike operations to be carried on in neutral territory, or refused to disavow and make reparation for such acts when committed by its subordinates on their own initiative, would bring down upon itself the reprobation of civilized mankind. Hostilities may be carried on in the territory of either belligerent, on the high seas, and in territory belonging to no one. Neutral land and neutral territorial waters are sacred. No acts of warfare may lawfully take place within them. The Hague Conference of 1907 declared in the fifth Convention which dealt with neutrality in land warfare that "the territory of neutral powers is inviolable,"[2] and in the corresponding thirteenth Convention which dealt with maritime war that "any act of hostility, including therein capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral power, constitutes a violation of neutrality and is strictly forbidden,"[3] Even when cruisers have begun the chase of an enemy vessel on

(1) To refrain from carrying on hostilities within neutral territory.

[1] See § 223. [2] See Article 1. [3] See Article 2.

the high seas, they may not follow it into neutral waters, and there complete the capture.

In the year 1800 a just and logical extension of these rules was made by a great British judge who has never been accounted a champion of neutral rights. We refer to Sir W. Scott, who laid down in the case of the *Twee Gebroeders* [1] "an act of hostility is not to take its commencement on neutral ground." He also said, "I am of opinion that no use of a neutral territory for the purposes of war is to be permitted. I do not say remote uses, such as procuring provisions and refreshments, and acts of that nature, which the law of nations universally tolerates, but that no proximate acts of war are in any manner to be allowed to originate on neutral grounds." And in pursuance of this view he released four Dutch ships, which had been captured in Dutch waters by boats sent from the sides of a British man-of-war lying not far off in neutral Prussian waters. General acceptance has been given to the doctrine that the completion of preparations for an immediate act of hostility is forbidden to belligerents in neutral waters. This interpretation of the received rule would suffice to bring within its prohibitions the assemblage in a neutral bay of a number of torpedo boats prepared to make a sudden dash for a neighboring port belonging to the other belligerent, especially if they stole into the bay or harbor one by one, having picked their way towards it along a neutral coast-line. Indeed, it might be argued that any use by belligerent torpedo boats of neutral waters which lay near a hostile line of naval communication was forbidden, since nothing would be easier for them than to make a dash from thence at a passing enemy squadron many miles out at sea.

[A complicated case with respect to breach of neutrality was that of the *Reshitelni*, a Russian torpedo boat.] [2] She escaped

[1] C. Robinson, *Admiralty Reports*, vol. III, pp. 162, 164, 165.

[2] [The author seemed to think that possibly this was a case of extreme necessity justifying breach of neutral territory; and conceivably there are circumstances which will justify infraction of neutrality (Cf. Oppenheim, *International Law* vol. II § 326); but he had cited immediately before it the case of the *Caroline* from which he deduced this doctrine. It is true that the *Caroline* is an authority on self-preservation, but it

from Port Arthur, then besieged by Japan, on August 10, 1904, and in spite of pursuit by two Japanese destroyers entered the neutral Chinese harbor of Chefoo the next morning. From thence she is said to have sent important despatches to the Russian government. The two Japanese vessels waited outside till the night of August 11, and then entered the harbor, as their enemy did not come out. Meanwhile the Chinese authorities and the Russian commander had carried on negotiations, which ended in an agreement that the vessel should be disarmed and interned. Some kind of disarmament was effected, but how far it extended is very doubtful. There is a direct conflict of testimony between the Japanese officers on one side and the Russian and Chinese officers on the other. The former declare that coaling had been permitted, that no effective steps towards disarmament had been taken, and in particular that all the ammunition was left on board. The latter assert that the vessel had been disarmed completely, and in particular that the guns had been rendered useless and the engines disabled. In the early morning of August 12, a Japanese party boarded the *Reshitelni*, and offered her commander the alternative of putting to sea in an hour or surrender. They were met by a refusal followed by an unsuccessful attempt to blow up the vessel; and after a short struggle they seized her and carried her off.[1] If the case had stood alone, little could be said in defence of the action of Japan. But it was one of a series, in all of which the action of China had been weak and dubious. She allowed Russia to violate her neutrality again and again, and had, therefore, little reason for feeling aggrieved when Japan retorted in kind. But nevertheless the Japanese authorities acted with undue harshness. Evidently they had marked down their prey, and did not mean to let it escape them. Their correct course would have been to give the Chinese officials a few

is out of place under the law of neutrality, because it arose in connection with a rebellion, not with a war; and neutrality was therefore out of the question. The case has consequently been transferred to § 65.]

[1] Takahashi, *International Law applied to the Russo-Japanese War*, pp. 437–444; Lawrence, *War and Neutrality in the Far East*, 2d ed., pp. 292–294.

hours to secure complete disarmament and internment. At the end of that period, if what they demanded had not been done to the satisfaction of the Japanese consul, they would have been quite justified in capturing the Russian vessel. Incidentally the case throws light on another point. Resistance was offered to the boarding party when they made their capture; but it was never maintained that this in itself disentitled the Russians to any redress that might be due to them for the seizure. This fact, as far as it goes, supports the doctrine that a belligerent vessel suddenly attacked in neutral waters has the right to defend herself if the neutral cannot or will not defend her, though her first duty is to appeal, if there is time, to the local authorities for protection.[1] [Another case where the facts were disputed occurred during the great war. After the battle of the Falkland Islands in 1915, the German cruiser, *Dresden*, escaped from the British fleet, took refuge in a neutral Chilean port, and asked to be allowed to stay there eight days for engine repairs. The Chilean port authority refused this, and the captain was told that the vessel must quit the port within 24 hours, or be interned. As she did not leave within that period, the captain was notified that the penalty of internment had been incurred. Meanwhile two British cruisers entered the port, and opened fire on the *Dresden*. She hoisted a flag of truce and informed the British that she was in neutral waters. This was disregarded, and she was given the choice of surrender or destruction. Her captain, however, adopted another course by giving orders to the crew to blow her up and sink her. The Chilean Government, in putting forward this case to Great Britain as a breach of neutrality by the British cruisers, pointed out that any fears as to the *Dresden* escaping were needless owing to the close watch kept by the British squadron, and that therefore their action was not justifiable on that ground. The British Government, in replying, offered a full and ample apology, though it alleged doubt as to the facts from which it did not appear that

[1] [Cf. Oppenheim, *International Law*, vol. II § 320. Westlake, *International Law*, vol. II. p. 239. Pearce Higgins, *Hague Peace Conferences*, p. 463.]

the *Dresden* had accepted internment, but had her colours flying and guns trained, and might have escaped in defiance of the Chilean authorities. But the Chilean statement was taken as accurate, owing to the length of time that an investigation would have required.] [1]

[The infringement of neutrality by belligerent aircraft will be considered under the duties of neutral states.] [2]

## § 230

We will now consider the duty of a belligerent

*To leave unmolested as far as possible neutral submarine cables.*

(2) To leave unmolested as far as possible neutral submarine cables.

And in this connection it will be convenient to deal with the various questions that have arisen in recent years with regard to such cables in time of war, though many of them are concerned with the action of neutrals rather than the proceedings of belligerents.[3]

Submarine cables are comparatively new things. The largely signed Convention of 1884 laid down rules for their protection in ordinary circumstances, but expressly reserved full liberty of action to states at war. Since it was negotiated law-making treaties have come into existence in abundance, but among all their stipulations there is but one article that bears on the subject we are considering. It is contained in the Hague Code of land warfare as revised in 1907, and provides that submarine cables connecting territory under belligerent occupation and neutral territory are not to be seized or destroyed except under stress of absolute necessity. If cut, they must be restored and compensations arranged at the conclusion of peace.[4] Usage cannot be invoked to make good deficiencies of legislation, for there has not been sufficient time to create a body of customary law. But statesmen and writers have made many proposals, some of them

[1] [*American Journal of International Law* (1916) *Official Documents*, vol. x, pp. 72–76.]

[2] [See § 236.]

[3] G. G. Wilson, *Submarine Telegraphic Cables in their International Relations.*

[4] See Article 54.

luminous and well-considered, others more remarkable for ingenuity than utility. In 1869 the United States suggested, without result, the neutralization of all submarine cables, and the powers were asked in vain to make wanton destruction of them in the open sea an act of piracy.[1] In the Hispano-American War of 1898 it was sought to find justification for the cutting of cables between neutral and enemy territory by laborious attempts to prove that they were contraband or composed of contraband material. And it was argued that if a cable reached the land at a port under blockade, the sending of warlike messages into the place was for that reason an offence which called for the destruction of the instrument whereby it was committed. In 1904 a new theory was published in Germany to the effect that a submarine cable is under the territorial sovereignty of the country from whose soil it proceeds. It is a bridge under the water, a sort of tentacle or arm of dominion pushed forth into the depths.[2] There seems no need for these somewhat far-fetched analogies and recondite arguments. The simple principle that ocean cables are means of communication is sufficient. When they are used by the enemy they may be controlled, or in the last resort cut, in any place where it is lawful to carry on hostilities, without regard to ownership or connection with neutral shores, just as a railway passing through a hostile country may be torn up on enemy soil, whether it is prolonged into neutral territory or not. The question of when and where cables may be cut, and the question of how to treat neutral owners and users of them, are important and difficult. The best way to deal with them is to take separately the cases which may arise. They may be reduced to four.

The first occurs *when the cable connects two portions of the territory of a belligerent.* Then undoubtedly he may destroy it if he pleases; and the enemy may destroy it if he can, whether he picks it up in hostile waters or on the high seas. Only in neutral waters is it free from attack. In 1903 the

[1] Moore, *International Law Digest*, vol. II, pp. 23, 475, 476.

[2] Scholz, *Krieg und Seekabel*, quoted by Phillipson, *Studies in International Law*, pp. 69–71.

Government of Brazil broke the submarine cable in the Bay of Rio de Janeiro as the revolted fleet under Admiral Mello entered, and in the Hispano-American War of 1898 the Americans cut the cable along the coast of Cuba between Havana and Santiago.[1] Further, belligerents may exercise a censorship over all telegrams they convey, and refuse to receive despatches they regard as suspicious. At the beginning of the Boer War Great Britain resorted to these measures in connection with the cables between England and South Africa, which were not only under British sovereignty, but were also British-owned. For a time she refused all cipher despatches, and censored all telegrams proceeding by way of Aden. In August, 1901, after the back of the Boer resistance had been broken, she reopened the service to telegrams sent in any of the authorized commercial codes. Violent protests were made in the continental press; but she was clearly within her rights. Neutrals cannot be allowed to use belligerent cables to the detriment of the State which controls them.

The second case arises *when the cable connects the territories of the two belligerents.* Then either or both may cut it, or they may enter into arrangements for working it in such a way as to preclude its use for warlike purposes. Thus in 1877 at the beginning of the Turko-Russian War the Turks cut the cable between Constantinople and Odessa. But in 1894 the neutral-owned cables connecting China and Japan were not cut because the proprietors undertook to pass no warlike messages; and in 1898 at the outbreak of the Hispano-American War both sides agreed to keep intact the cable between Havana and Key West, each subjecting all messages sent in at his end to a severe censorship, and allowing no ciphers to pass.[2] The right to cut cables uniting the territories of the two belligerents, and also those uniting two parts of the territory of the same belligerent, was recognized by the Institute of International Law in 1902 [and 1913], except in neutral or neutralized waters.[3]

Our third and most difficult case is met with *when the cable*

[1] Phillipson, *Studies in International Law*, p. 72. [2] *Ibid.*, pp. 73, 74.

[3] *Annuaire de l'Institute de Droit International*, 1902, p. 331. [*Ibid*, 1913, pp. 657–658.]

*connects the territory of a belligerent with that of a neutral.* In connection with it we encounter grave differences of opinion. On the one hand the right of the neutral to hold communication with either belligerent has been strongly asserted, and on the other the right of a belligerent to prevent warlike information reaching his enemy. It is obvious that some kind of working compromise is necessary. In 1902 the Institute of International Law could go no further than the assertion that the neutral must not allow the transmission of despatches which lend assistance to one of the belligerents. It also denied to a belligerent the right to cut on the high seas a cable connecting enemy and neutral territory, except in cases where it had established an effective blockade of the enemy landing place; [and this was superseded by a similar provision in its Manual of the Laws of Maritime Warfare, 1913.][1] But there seems no good reason why blockade should be deemed to affect the bottom of the sea beneath the keels of the blockading ships, nor on the other hand why a belligerent should be denied the right to perform in the open waters of the globe one particular kind of warlike operation which involves no unsuspected danger to neutral life and limb, when he is at liberty to perform therein all others of a similar kind. It should, of course, be provided that such a drastic method should not be resorted to unless it is the only way of preventing the transmission of valuable information to the enemy. It may happen that little use of a cable for warlike purposes is likely to be made, while the use of it for peaceful purposes is enormous. In such circumstances a belligerent might not care to take the responsibility of cutting it, as was the case with Spain, when in her war of 1898 with the United States she refrained from interfering with any of the cables between Europe and the shores of her enemy. It is also possible that some agreement might be come to between the belligerents and the neutral to seal the cable at both ends during the war, or to use it subject to a satisfactory censorship. But in the last resort there should exist liberty to cut, as the United States cut in the war of 1898 the cables between Santiago and Jamaica, and Manila and Hong-Kong. The

[1] *Annuaire*, 1902, p. 332; [1913, p. 658].

question of compensation to neutral owners then arises, though surely none need be made to enemies. In the cases just mentioned the United States maintained that no right to payment existed, but as a matter of equity made good the actual damage done.[1] We have already seen that the Hague Code for land warfare allows submarine cables connecting an occupied territory with a neutral territory to be seized or destroyed in the case of absolute necessity, under an obligation to restore and compensate when peace is made. We must also remember that the Second Hague Conference expressed in its Final Act the wish that in default of a naval code the powers should "apply as far as possible to war by sea the principles of the Convention relative to the Laws and Customs of War on land." These considerations support the view that, subject to compensation, destruction on the high seas is permissible in the last resort. [In the great war, Great Britain cut two German cables to the United States (then neutral), and the Germans cut a British cable near Fanning Island, but otherwise left British cable communication with America intact. The result was that, while the British were unhampered, the Germans had no cable available to the United States, and made a complaint to that effect. The American reply however maintained the lawfulness of severing cables by belligerents in the circumstances.][2]

The fourth and last case comes before us *when the cable connects the territories of two neutrals.* As to this the opinion of jurists is almost if not quite unanimous. The Institute of International Law at its Brussels meeting in 1902 agreed that such cables were inviolable.[3] The United States Naval War Code of 1900 laid down the same rule;[4] [the Code was withdrawn in 1904, but this provision is embodied in instructions for the Navy of the United States, governing maritime warfare, issued in June, 1917]. But a difficulty might arise when a cable with two neutral *termini* was a link in a chain of telegraphic communications used by a belligerent for his warlike

[1] U. S. Naval War College, *International Law Situations*, 1901, pp. 177, 178. [2] [Garner, *International Law and the World War*, vol. II, § 560.]
[3] *Annuaire*, 1902, p. 331; 1913, p. 657. [4] See Article 5.

purposes. Then, if diplomatic action failed to secure a closure of it to his messages, the other belligerent might claim with some reason a right to cut it. But undoubtedly the general rule must be that cables between neutral shores cannot be molested.[1]

§ 231

In addition to respecting neutral sovereignty by refraining within its area from warlike operations, whether fully developed or in their incipient stages, it is the duty of belligerents

*To abstain from making on neutral territory direct preparations for acts of hostility.*

(3) To abstain from making on neutral territory direct preparations for acts of hostility.

Warlike expeditions may not be fitted out within neutral borders, nor may neutral land or waters be made a base of operations against an enemy. The fighting forces of a belligerent may not be reinforced or recruited in neutral territory, and supplies of arms and warlike stores or other equipments of direct use for war may not be obtained therein by belligerent warships.[2] These prohibitions are imposed by International Law; and if a belligerent ignores them or a neutral suffers them to be ignored, the aggrieved parties, whether neutral or belligerent, can demand reparation and take means to prevent a repetition of the offence. But they do not apply to supplies and equipments that are useful for such purposes as sustaining life or carrying on navigation. With regard to these it used to be held that they were left entirely to the discretion of neutrals, who could make what arrangements they pleased, as long as they laid down the rules that were reasonable in themselves and applied them with absolute impartiality. The result was a mosaic of diverse and sometimes contradictory regulations, bewildering to belligerents and derogatory to the claim of International Law to be regarded as a science. The powers assembled at the Hague in 1907

[1] [See Pearce Higgins in *British Year Book of International Law* (1921–1922), pp. 27–36.]

[2] *Fifth Hague Convention of 1907* Article 4; *Thirteenth Hague Convention of 1907*, Articles 6, 18.

endeavored to remedy the confusion by negotiating a convention concerning the Rights and Duties of Neutral States in Maritime War. Its provisions bear throughout the marks of compromise. To some extent they retain the old liberty accorded to neutral governments. But in a large degree they limit it, and turn what had previously been questions for municipal regulation into matters controlled by general agreement. The Convention thus became a law-making document on a large scale, though it did little else than give a somewhat grudging and maimed consecration to rules that had previously been enforced by a state or group of states. We shall consider its provisions in the next Chapter, when we come to deal with the duties of neutral governments.

A belligerent, as we have just seen, is bound not to use neutral territory as a base of operations, or as a convenient place for the organization of warlike expeditions which may proceed from thence to attack the enemy or prey upon his commerce. But it is impossible to understand the nature and extent of these obligations without an examination of the exact sense to be attached to the two phrases, "base of operations" and "warlike expedition." The former is a technical term of the military art, and was introduced into International Law when the growing sense of state-duty rendered it necessary to define with accuracy the limits of belligerent liberty and neutral forbearance. It is to be found in the second of the three rules of the Treaty of Washington of 1871;[1] but the Geneva arbitrators did not attempt to explain it in their award. It occurs without comment in the French Neutrality Regulations of 1898 and 1904, and also in the Hague Convention on maritime neutrality.[2] Hall has a most able discussion on it,[3] in the course of which he contends that "continued use is above all things the crucial test of a base"; but it is difficult to resist the argument that, though continuous use does undoubtedly make a place from which supplies and reinforcements are drawn into a base, yet we cannot go so far as to say that without continuous use there can be no question of any

[1] See §§ 52, 236. [2] See Article 5.

[3] *International Law*, 7th ed., § 221.

violation of neutrality. It is quite possible for instance, to conceive of a case where the admission into a neutral port of a warlike expedition for the purpose of refitment and coaling would enable it to strike a successful blow at some neighboring possession of the other belligerent. Surely in such circumstances the port would be a base of operations, even though the belligerent flag was seen in it on no other occasion during the war. The phrase we are considering is often used in connection with such matters as the supply of arms and ammunition, the recruitment of men, and the addition of equipments for war. But these things were prohibited definitely and directly long before the phrase was introduced, and it cannot be regarded as prohibiting them all over again indefinitely and indirectly. It is suggested that the words should be used to cover cases where acts which neutrals need not prohibit when done to a slight extent or for a short time, have taken place on such a scale or for so long a time as to turn them into occurrences highly beneficial to the belligerent in pursuit of his warlike ends. For instance, a brief visit to a neutral port is quite allowable, but a lengthy stay for purposes of rest and refitment should be forbidden; or a prize may be taken in and kept for a short period, but if the port is filled with prizes and they are left in safety there for an indefinite time, it should be regarded as a base of operations.

We have now to consider what is meant by a warlike expedition. When an army is organized or a squadron fitted out in neutral territory, with men, officers, arms, and equipment complete, there can be no doubt about the propriety of the description. But what effect has the absence of some of the elements which must be combined in order to make a fighting force? An answer to this question is best given by reference to the cases in which the point was decided. In 1828 a civil war broke out in Portugal between the partisans of Donna Maria, the youthful constitutional sovereign, and those of her uncle, Don Miguel, who had seized the throne as the champion of absolutism. A body of troops in the service of Donna Maria, being driven out of Portugal, took refuge in England, and, along with other Portuguese adherents of the

constitutional cause, endeavored to fit out an expedition in favor of their mistress. The British Government warned them that it would not allow the execution of such a design, and was informed in reply that the only object of the refugees was to send unarmed Portuguese and Brazilian subjects in unarmed merchant vessels to Brazil, then under the rule of an Emperor belonging to the royal house of Portugal. Early in 1829 about seven hundred men under Count Saldanha embarked at Plymouth in four unarmed vessels, nominally for Brazil, but really for Terceira, one of the Azores which had remained faithful to Donna Maria. They were unarmed, but under military command; and the arms intended for them had previously been shipped as merchandise from another port. Off Port Praya in Terceira they were intercepted by Captain Walpole of the *Ranger*, who had been despatched from England to see that they did not land in the Azores. He told Count Saldanha that they were free to go where they would except to the islands. On the refusal of the Portuguese commander to give up his purpose or yield to anything but force, his vessels were escorted to a point within five hundred miles of the English Channel. Captain Walpole then returned to Terceira, and the baffled expedition put into Brest. The case established the doctrine that, when a warlike expedition is fitted out on neutral ground against a belligerent, its individual members need not be armed in order to bring it within the purview of the law, if only they are organized as soldiers and placed under military command. Jurists have generally held that the British ministers were right in their view of the illegality of the expedition, and wrong in the means they took to stop it. They should have prevented its departure from British waters where they had jurisdiction, instead of coercing it in Portuguese waters and on the high seas where they had none. By the proceedings they ordered they violated the territorial sovereignty of another state in their zeal to prevent a violation of their own.[1]

Another question in connection with expeditions was raised

[1] Phillimore, *International Law*, vol. III, §§ CLIX, CLX; Snow, *Cases on International Law*, pp. 421–425.

in 1870, when a large number of Frenchmen and Germans, resident in the United States, returned to their own country at the outbreak of the Franco-Prussian War, in order to fulfil their obligation of military service. As long as they travelled singly or in small groups as ordinary passengers, no international question could by any possibility arise. But in one case as many as twelve hundred French subjects embarked at New York in two French ships which carried a cargo of rifles and ammunition. The attention of Mr. Fish, then Secretary of State in President Grant's Cabinet, was called to the matter. He decided that the vessels could not be looked upon as constituting a warlike expedition against Germany; and there can be little doubt that he was right.[1] The Frenchmen were unarmed and unofficered. There was no attempt to submit them to military discipline, and though it was not denied that they would be enrolled in the fighting forces of their country as soon as they reached its soil, it was held that they did not leave New York in an organized condition. Their warlike uses were too remote for them to be considered as a portion of the combatant forces of France in such a sense that American neutrality was violated by their departure, though they could have been made prisoners of war if the vessels which carried them had been captured on the voyage by German cruisers.

The two cases we have given will enable us to form a fair idea of what constitutes a warlike expedition.[2] It must go forth with a present purpose of engaging in hostilities; it must be under military or naval command; and it must be organized with a view to proximate acts of war. But it need not be in a position to commence fighting the moment it leaves the shelter of neutral territory, nor is it necessary that its individual members should carry with them the arms they hope soon to use. When a belligerent attempts to organize portions of his combatant forces on neutral soil or in neutral waters, he commits thereby a gross offence against the sover-

[1] Hall, *International Law*, 7th ed., § 222.

[2] [See also Curtis in *American Journal of International Law*, vol. VII (1914), pp. 1–37; 224–255.]

eignty of the neutral government, and probably involves it in difficulties with the other belligerent, who suffers in proportion to his success in his unlawful enterprise. The injured neutral may not only demand reparation and indemnity, but may also use force, if necessary, to prevent the departure of expeditions from its territory or seize the persons and things of which they are composed.

§ 232

The next duty of belligerent states is

*To obey regulations made for the protection of neutrality.*

(4) To obey regulations made for the protection of neutrality.

By the common law of nations the land forces of the combatants are not allowed to cross a neutral frontier, and the Hague Convention of 1907 (No. V) on neutrality in land warfare places a wide construction on the prohibition.[1] But it allows under strict conditions [2] a passage over neutral territory to the sick and wounded of belligerent armies.[3] The only other case in which bodies of soldiers may be permitted to cross neutral borders occurs when they are driven over them by the enemy. In such circumstances humanity forbids that they should be forced back to captivity or death by lines of neutral bayonets; but at the same time impartiality demands that they shall not be allowed to use the territory they have entered as a place of refuge, in which, safe from pursuit, they can reorganize their shattered forces, and from which they can sally forth to renew the conflict when occasion offers. The two are reconciled by the practice of disarming them as soon as they cross the frontier and retaining them in honorable detention till the conclusion of the war. This is called *interning*, and the troops so treated are said to be *interned*. They are bound to submit to the process and to make no attempt to compromise the neutrality of the state in which they find asylum. The expenses to which it is put in consequence of their presence should be repaid by their own government.[4] An example of

[1] See Articles 1, 2. [2] See § 165. [3] See Article 14.
[4] See *Fifth Hague Convention of 1907*, Articles 11, 12.

internment occurred in 1871, when eighty-five thousand ragged and starving French troops, the wreck of Bourbaki's army, took refuge within the Swiss frontier from the pursuit of Manteuffel in the closing days of the Franco-German War. They received permission to cross it by special convention between their commander, General Clinchant, and the Swiss General Herzog, and were at once disarmed, clothed and fed, by the orders of the central government of the Helvetic Republic. At the conclusion of peace they returned to France under an agreement between the two countries which provided for the payment by the latter of a lump sum to defray the costs to which the administration and citizens of Switzerland had been put in consequence of their presence.[1] [Other instances of internment occurred during the great war,[2] and a peculiar question as to the passage of troops occurred after the cessation of hostilities. By the armistice of November 11, 1918, Germany undertook to evacuate within fifteen days the territories which she had invaded. On November 13, the Dutch notified the principal victorious powers that some strong German units had demanded a passage across Limburg, a tongue of Dutch neutral territory; that the Dutch government had been unable to resist this demand; and that it was influenced in allowing it by the fact that it was to the greatest interest of the allies to have Belgium evacuated as soon as possible, and that internment was out of the question owing to the acuteness of the food situation in Holland and the lack of accommodation there. Accordingly, over 70,000 German troops were disarmed and allowed to cross Limburg on their way to Germany. The allied governments protested against this as a breach by Holland of her neutrality, and technically it may have been such, for an armistice does not end a war, and the proper course was internment. At the same time, the comparative strength of the German forces, and the shortness of food in Holland made a strict observance of neutrality difficult, and after further

[1] Fyffe, *Modern Europe*, vol. III, 462; *Annual Register for 1871*, pp. 160, 161; Calvo, *Droit International*, § 2634.

[2] [Oppenheim, *International Law*, vol. II, § 339.]

discussion the matter dropped.] [Aircraft and their crews landing on neutral territory during the great war were as a rule interned, but this apparently did not apply to crews of such craft rescued on the high seas and brought into neutral territory.] [1]

In sea warfare practice favors admission under conditions, instead of exclusion. Unless a neutral expressly forbids the entry of belligerent warships, they may freely enjoy the hospitality of its ports and waters. Permission is assumed in the absence of any notice to the contrary, but nevertheless it is a privilege based upon the consent of the neutral, and therefore capable of being accompanied by conditions or withdrawn altogether as a punishment for illegal conduct.[2] Moreover, a rule of absolute exclusion may be adopted as long as it is applied to each of the combatants, the latest instance being that afforded by the Scandinavian powers in the Russo-Japanese War.[3] Belligerent commanders can demand that they shall not be asked to submit to unjust and unreasonable restraints, and that whatever rules are made shall be enforced impartially on both sides. But further they cannot go. Where they enter on sufferance they must respect the wishes of those who permit their presence. Only when their vessels are driven by stress of weather, or otherwise reduced to an unseaworthy condition, can they insist on admission as a matter of strict law. Their right to shelter under such circumstances is called the Right of Asylum, and cannot be refused by a neutral without a breach of international duty. [During the great war, the powers fighting against Germany urged neutral powers to exclude altogether enemy submarines on the grounds of the ease with which they could escape control and observation, the impossibility of identifying them and determining whether they were neutral or belligerent, combatant or non-combatant, and the fact that replenishment of them constituted the port from which they drew their supplies a base of naval operations. Neutral states, however, did

[1] [Fauchille, *Droit International Public*, vol. II, § 1461[1].]

[2] [Oppenheim, *International Law*, vol. II, § 341 *a*.]

[3] Lawrence, *War and Neutrality in the Far East*, 2d ed., pp. 133, 134.

not by any means universally adopt the course suggested. Sweden, Norway, and Holland, it is true, refused admission to submarines except in case of *force majeure*, and Spain excluded them altogether on pain of internment; but the United States allowed them to enter its ports.[1] It cannot be denied that there was much force in the allied contention that there is a marked difference in this respect between submarines and surface craft. In fact the whole question of entry needs reconsideration. A suggested solution is that neutrals should be forbidden to allow the entry into their territorial waters of belligerent warships of any description, except those chased by the enemy or disabled by battle or storm [2]; but whether naval powers with few coaling stations would be likely to accept this is open to question.

One other point in this connection may be disposed of here. There seems to be no valid reason for distinguishing a purely commercial submarine of the enemy from any merchant surface vessel, so far as free entry into neutral ports is concerned.[3] Argument to the contrary seems to be based on the difficulty of making such a vessel comply with visit and search by a belligerent.[4] But surely a merchant vessel does not cease to be such because she can escape pursuit easily.]

In recent times many states have issued neutrality regulations at the beginning of wars in which they were not engaged, while others have preferred to deal with each case as it arose. Rules have thus grown up as to the length of stay allowed to belligerent war-ships in neutral ports, the amount of coal and provisions they may take in, the conditions on which they may execute repairs, and hosts of other matters. The most important of them will be discussed when we deal with the duties of neutral states.[5] We shall then see that some of these regulations have become, and others are becoming, rules

[1] [Oppenheim, *International Law*, vol. II, § 344 *a*.]

[2] [Perrinjaquet in *Revue Générale de Droit International*, vol. XXIV (1917), p. 230. Cf. Garner, *International Law and the World War*, vol. II, § 564.]

[3] [See *The Deutschland*, Garner, *op. cit.*, § 565.]

[4] [Fauchille, *Droit International Public*, vol. II, § 1463[22].]

[5] See § 236.

of International Law. Here we must be content to assert as strongly as possible that obedience is due to them all, on condition of their steady and impartial administration.

§ 233

Every belligerent lies under a strong obligation

*To make reparation to any state whose neutrality it may have violated.*

International law contains no precise rules as to the exact form which such reparation should take. It certainly requires the restoration of property illegally captured, when ships or goods have been seized within neutral jurisdiction; but it does not go further and prescribe the scale on which indemnities should be calculated, or the wording of apologies, or the forms to be used in paying ceremonial honors to the flag of the injured state. These details are left to be settled by negotiation at the time; and all we are able to say about the matter is that the reparation should be adequate, and proportioned to the gravity of the offence. In all cases it must be made to the injured neutral, whose duty it is to deal with the other belligerent if loss has fallen upon him in consequence of the violence complained of. For instance, when the commander of a ship of war seizes a vessel belonging to his enemy in neutral waters, the neutral government demands from the country of the offender the surrender of the prize or takes possession of it if it is within the jurisdiction, and after having obtained control of it, restores it to the original belligerent owner, either by administrative act or through the machinery of a prize court. If the neutral state is unable or unwilling to obtain satisfaction from the offending belligerent, serious complications are likely to follow. It exposes itself to the risk of similar outrages from the injured side. Claims for indemnity may be made against it, and it may even be threatened with war.

(5) To make reparation to any state whose neutrality it may have violated.

Violations of neutrality by a belligerent may take as many forms as the duties they contravene. Like other offences

they may be gross or slight, committed in heedlessness and hot blood or carefully planned and executed according to a predetermined method. They are generally the unauthorized acts of over-zealous or unscrupulous subordinates. The appropriate reparation varies from a formal apology to a serious humiliation. In important cases the matter is brought by diplomatic complaint before the government of the offending state; and it is expected to undo the wrong as far as possible, punish the perpetrators, and give whatever satisfaction is deemed just and proper. A good example of executive action is afforded by the case of the *Florida*, one of the Confederate cruisers in the American Civil War. In October 1864, she was seized in the neutral Brazilian port of Bahia by the Federal steamer *Wachusett* and brought as a prize to the United States. Brazil at once demanded reparation, and the government of Washington disavowed the act. Full satisfaction was offered by Mr. Seward, then Secretary of State. The commander of the *Wachusett* was tried by court-martial; the United States consul at Bahia, who had advised the attack, was dismissed; the Brazilian flag was saluted on the spot where the capture took place; and the crew of the captured vessel were set at liberty. The *Florida* herself, ought, it was admitted, to have been delivered over to the Brazilian authorities; but she was run into and sunk in Hampton Roads by a Federal transport, and it was therefore impossible to restore her.[1] [With this may be contrasted the case of the *Valeria*, where the breach of neutrality was committed in good faith and without negligence. She was a German vessel captured by a British cruiser, during the great war, just within neutral Norwegian waters, though the captors honestly believed that she was outside them. Whilst she was being conducted to a British port, the weather became so bad that the cruiser was forced to abandon her, and, in order to prevent her becoming dangerous to navigation as a derelict, to sink her by gunfire. The British Prize Court held that, though the *Valeria* must have been restored if she had been afloat, yet the claim for her

[1] Moore, *International Law Digest*, vol. VII, p. 1090; Wheaton, *International Law* (Dana's ed.), note 209.

value could not be sustained; for no money could restore her, and a money claim to buy a new ship was out of place, as the principle on which the court acts where there is no neglect is *restitutio in integrum*, and not the award of a *solatium* for the loss to the owner. Any claim by the Norwegian government for injury to its neutrality stood on a different basis, and must be effected through diplomatic channels.][1]

It is sometimes held that states engaged in hostilities possess a right to make use of and even destroy vessels and other property belonging to neutral individuals and found within the limits of belligerent authority, if the exigencies of warfare render such use or destruction a matter of great and pressing importance. This real or supposed right is called *droit d'angarie*, or *jus angariae*, which has been anglicized into angary.[2] Now that the Hague Conference of 1907 has decided that payment must be made even for requisitions levied on subjects of the hostile state,[3] it can hardly be contended that neutral property permanently situated in a belligerent country can be seized without compensation, if only it is urgently required for warlike purposes. The claim refers to such property when temporarily within the belligerent's control, the usual case being that of neutral merchantmen found in a belligerent's own ports or ports under his military occupation. The seizure of such vessels and their use for purposes of transport was not uncommon in the seventeenth century or altogether unknown in the eighteenth. [Down to the outbreak of the great war] some authorities regarded it as possible,[4] but the whole trend of modern international action seemed to show that it was obsolete in its most vexatious form of a wholesale embargo on neutral shipping. Treaty after treaty had forbidden it. The assertion of the so-called right is always coupled with an admission that compensation must be made for its exercise. Even the milder manifestations of the power to seize had been looked

[1] [L. R. [1921] 1 A. C. 477. For other cases, see *The Dresden*, *ante* § 299, and Oppenheim, *International Law*, vol. II, § 362.]

[2] [See C. Ll. Bullock in *British Year Book of International Law* (1922–1923), pp. 99–129.]

[3] *Règlement with regard to Land Warfare*, Article 52.

[4] Perels, *Seerecht*, § 40; *U. S. Naval War Code*, Article 6.

on askance, and provoked much controversy. Thus, in 1870 the Germans sank six English colliers in the Seine at Duclair to stop the advance up the river of some French gunboats. Compensation was demanded, and after some hesitation given; and the act was excused on the ground that the danger was pressing and could not be met in any other way.[1] A provision made by the Second Hague Conference with regard to neutral railway material found by an invader in occupied territory points in the same direction. It is not to be "requisitioned or utilized by a belligerent except in the case of, and to the extent required by, absolute necessity." When seized it is to be put back as soon as possible, and meanwhile the neutral has the right of making a corresponding seizure of rolling stock coming from the territory of the belligerent. Moreover, compensation is to be paid on both sides.[2] If in land warfare, when it has hitherto been the custom to lay hands on all the transport within reach without drawing nice distinctions as to its ownership, the practice is now surrounded with the closest restrictions, there is little to be said for it in maritime struggles, where the difference between neutral and belligerent property has always been sharply accentuated. Moreover, it is difficult to see why vessels alone should be taken. Why not specie also, or cargoes of arms and ammunition, or indeed anything the belligerent is in need of for warlike purposes? The practice, if good at all, is good for whatever an army or navy may require. Belligerents should make war with their own resources and what they can capture from the enemy, not with neutral property which is unfortunate enough to be for the moment in their power. [The author summed up his view (which he had no opportunity of revising in the light of occurrences between 1914–1918) by stating that] extreme need might excuse small seizures, but that the act would nevertheless be an offence, and as such required atonement — great or slight according to the circumstances of the case; [and he adopted] the vigorous words of Dana,[3] that angary "is not a right at all, but an act resorted to from

[1] *Annual Register*, 1870, p. 110.

[2] *Fifth Convention of the Hague Conference, of 1907*, Article 19.

[3] Note 152 to Wheaton's *International Law*.

necessity, for which apology and compensation must be made at the peril of war."[1] [In 1917, during the great war, Great Britain "requisitioned" a number of neutral Swedish and Dutch vessels in British ports, and paid compensation for their use. Various reasons were put forward by the British government to Holland as a justification for this. One was that, though these vessels were under the Dutch flag, yet they were wholly or partially owned by British subjects, and that, in view of the German unlawful submarine campaign, valuable British property could not be allowed to run the risk of being sunk at sight, because the vessels, being under a neutral flag, were unarmed. Another reason, closely implicated with the first, was that the Dutch were unable to prevent the German indiscriminate sinking of neutral ships, that they were powerless to secure their own neutrality from being infringed, and that therefore they could not complain if the British protected their belligerent rights in this way. This seems to be a sound argument,[2] and the Dutch contention that it did not rest on any principle of law was not correct. Whether the case might be based alternatively on angary is not clear. Throughout the correspondence between the British and Dutch governments the word is not mentioned; yet the British admitted that there was some analogy between their action and the requisition of railway material under the Hague Convention, though they pointed out that the Dutch ships had not been required to take part in hostile action, which presumably they considered to be an essential in angary.[3] The best method of settling the point seems to be to concentrate attention on the facts without attaching much weight to the particular name ("requisition"

[1] For the text of the Fifth and Thirteenth Conventions of the Second Hague Conference, to which constant reference has been made throughout this Chapter, see Higgins, *The Hague Peace Conferences*, pp. 281–289, 446–456; Scott, *The Hague Peace Conferences*, vol. II, pp. 400–414, 506–523; Whittuck, *International Documents*, pp. 143–150, 208–217; and *Supplement to the American Journal of International Law*, 117–127, 202–216.

[2] [Cf. Oppenheim, *International Law*, vol. II, § 318.]

[3] [*British and Foreign State Papers*, vol. CXI (1917–1918), pp. 465–473. Cf. Oppenheim, *op. cit.*, § 364. Fauchille, *Droit International Public*, vol. II, §§ 1490[5]–1490[6].]

or any other) by which they were described. Here, neutral property was unquestionably taken against the will of the neutral owners. To say that it was not put to hostile uses and that it was therefore not taken by "right of angary" is to beg the question by assuming that using ships for transport is not employing them for purposes that help the belligerent who seizes them. In any event, if the case is to be argued on the ground of angary, it cannot be said that it was nearly as drastic an action as the "requisitions" of neutral vessels in 1918 which we now proceed to discuss; and, as we have indicated, the "requisitions" of 1917 are sufficiently justified on another ground.

In March, 1918, Great Britain requisitioned other Dutch ships, and did so expressly in pursuance of the right of angary. Full compensation was made for their use. The Dutch government contended that the right of angary was an ancient rule which had fallen into desuetude until it was unearthed by the British government to justify an arbitrary act on its part. The British government replied by citing authority to show that the right is not extinct; and, as we have seen, it certainly is not, though, prior to the great war, it did appear to be obsolescent.[1] The United States also, in March 1918, "requisitioned" Dutch ships on the ground of "imperative military needs,"[2] and France and Italy also adopted this course. The British Prize Court had already, in 1916, laid it down in the *Zamora*[3] that a belligerent power has by International Law the right to requisition vessels or goods in the custody of its prize court, provided (1) the property is urgently required for use in the defence of the realm, the prosecution of the war, or matters involving national security; (2) there is a real question to be tried by the court, so that it would be improper to order its immediate release; and (3) the prize court must decide judicially whether in the particular circumstances the right is exercisable.[4]

[1] [*British and Foreign State Papers*, vol. CXI (1917–1918), pp. 465–473.]

[2] [Garner, *International Law and the World War*, vol. I, § 119.]

[3] [L. R. [1916] 2 A. C. 77.]

[4] [Cf. Albrecht, *Requisitionen von neutralem Privateigentum inbesondere von Schiffen* (Supplement to *Zeitschrift für Völkerrecht*, vol. VI (1912).]

It is not easy to pronounce a dogmatic opinion on this seizure of neutral vessels in 1918. But when it is recollected that what was at stake then was not merely the existence of this or that state which exercised the right of angary, but the existence of International Law itself, it is hard to imagine a stronger justification for what Great Britain and her allies did; and the neutrals affected seemed scarcely to recognize the magnitude of the issues involved. On the other hand, we do not underrate the evil plight of the smaller neutral states. It was not so bad as that of the belligerents, but it was not much better. Many of them might have asked, "If this is neutrality what inducement have we to remain neutral?" Yet they themselves were not morally guiltless, for the continuance of the gross breaches of the laws of war and neutrality by Germany was due in some measure to their own apathy, and that apathy had its Nemesis in the drastic steps which the allies were compelled to take against neutrals in the fight to preserve civilization. Such measures need never be repeated if neutrals are put under a legal duty to see that a belligerent does not persistently violate the laws of war. At present what ought to be a legal duty is only a moral right, and in that respect International Law needs amendment.]

# CHAPTER III

## THE DUTIES OF NEUTRAL STATES TOWARDS BELLIGERENT STATES

### § 234

Duties of neutral states to be considered under five heads.

Some of the rules which prescribe the duties of neutral states in their dealing with belligerent members of the family of nations are perfectly clear, while others are indefinite and uncertain. The number of the former has been increased of late owing to the acceptance by the majority of civilized powers of the provisions contained in the two Conventions on state neutrality negotiated at the Hague in 1907. But even in these Conventions much was left to the discretion of neutral powers, and there still remain numbers of undecided questions as to which it is impossible to forecast the action of governments with any degree of confidence, since opinions disagree and practices vary. The only fruitful way of dealing with the matter is to follow the example of Professor Holland,[1] and attempt a classification of the duties of neutral states. We will add to his three main divisions two others, and consider the subject under the five heads of duties of abstention, duties of prevention, duties of acquiescence, duties of restoration, and duties of reparation. Under each head we will endeavor to distinguish carefully between what is matter of undoubted obligation and what rests only upon disputed views of justice and expediency.

### § 235

(1) Duties of abstention.

We will begin by a consideration of the *Duties of abstention* which a neutral state is called on to fulfil in time of war. Foremost among them comes the long-recognized obligation of *refraining from the grant of armed assistance to either side.* We have already traced the steps

[1] See his address to the British Academy on *Neutral Duties in a Maritime War.*

whereby it became generally admitted that a neutral cannot under any pretext assist either belligerent with troops or ships;[1] and as there is no disposition to dispute or ignore the established rule, we need not refer to it further.

A neutral must also refrain from *giving to one side in matters connected with hostilities privileges which it denies to the other.* Covenants to grant exclusive rights were at one time very common; but they accorded so ill with the enlarged conceptions of neutral duty which found favor at the end of the eighteenth century that states escaped from them as soon as possible, and refused in future to enter into similar arrangements. A good example may be found in the troubles that arose with regard to the seventeenth and twenty-second articles of the treaty of 1778 between France and the United States.[2] They gave to French ships of war and privateers the exclusive privilege of bringing their prizes into American ports, and provided that privateers of any nation at war with France should be forbidden to sell their prizes or other merchandise therein, or buy more provisions than were necessary to enable them to reach the nearest port of their own country, whereas the privateers of France were free to do all these things. In the war between England and France which broke out in 1793 Washington's administration encountered strong complaints from Great Britain of preferential treatment accorded to her enemy, and was seriously hampered in its efforts to preserve a strict neutrality by treaty obligations from which it could not escape. Negotiations for release were not successful till the end of the century,[3] when the objectionable stipulations of 1778 were dropped in the Convention of 1800.[4] The United States were henceforth free to hold the balance even between warring powers, and other nations have obtained for themselves a similar liberty. At the present time a neutrality conducted on the contrary principle would not be tolerated. This applies even to services of humanity. For instance, the reception in a neutral port of a vanquished

[1] See § 223.

[2] *Treaties of the United States*, pp. 301–303.

[3] Wharton, *International Law of the United States*, vol. II, pp. 134–142.

[4] *Treaties of the United States*, pp. 322–331.

warship closely pursued by a victorious enemy might prevent a capture on the point of being effected, and should not be allowed unless the defeated vessel was in immediate danger of sinking.

Another duty laid on neutral states is to abstain from *giving or lending money, or giving or selling instruments and munitions of war, to either belligerent.* With regard to money, there is universal agreement that giving and lending are on the same legal footing, and the guarantee by a neutral power of a loan issued by a belligerent would be equally objectionable. Yet individuals may do what their governments may not do, in this respect as in many others. Money is a form of merchandise, and neutral subjects may trade in it; though if they send to one belligerent specie or negotiable securities, the cruisers of the other may capture them on their voyage as being contraband of war. But neutral governments are in no way bound to prevent their subjects from taking stock in loans issued by belligerents.[1] No war of any magnitude runs its course without a resort to neutral money markets. Gifts by neutral subjects to the war chest of a foreign combatant are violations of International Law;[2] but if ordinary prudence were observed by the donors, it would be almost impossible to bring the offence home to them. With regard to the gift or sale of war material the duty of a neutral state is equally clear. The Second Hague Conference summarized accepted law in the words, "The supply in any manner, directly or indirectly, by a neutral power to a belligerent power, of warships, ammunition, or war material of any kind whatever, is forbidden." [3] But it is to be noted that, when two powers are at peace, either is quite free to sell a warship to the other. Thus the purchase at the end of 1903 by Japan from Argentina of the two powerful cruisers afterwards called the *Nisshin* and the *Kasuga* was perfectly legal, because the transaction was completed before the outbreak of the war with

[1] [Cf. Garner, *International Law and the World War*, vol. II, § 559.]

[2] Halleck, *International Law*, Baker's 4th ed., vol. II, p. 186 note.

[3] *Convention of 1907* (No. XIII) *concerning Neutral Rights and Duties in Maritime War*, Article 6.

Russia early in 1904.[1] But had hostilities commenced before the negotiations were finished, the Argentine government would have been bound to refuse delivery till after the conclusion of peace. The question whether a neutral government is under an obligation to discontinue public sales by auction of old warlike stores because belligerent agents are likely to purchase them, was raised in 1870, when France bought largely at American sales during her war with Germany. A committee of the United States Senate reported in favor of the action of the executive.[2] But the subsequent growth of opinion has been in the direction of greater carefulness, and in all probability a different course would be pursued were the circumstances to recur. Indeed, the wording of the Hague Article quoted above seems decisive. It forbids the supply of such things as we are considering "indirectly" as well as "directly"; and there can be no doubt that a large proportion of the cannon and rifles sent from New York to France in 1870 came indirectly through the hands of agents from the stores of the American government. But the duty of the neutral government in these matters ends with the regulation of its own proceedings. It need not attempt to control its subjects. The Hague Conference of 1907 laid down in two separate Conventions[3] that "a neutral power is not bound to prevent the export or transit, on behalf of one or the other of the belligerents, of arms, munitions of war, or, in general, of anything that can be of use to an army or fleet."

[The magnitude of the war of 1914–1918 increased neutral private trade in supplies and munitions to an extent previously unimagined. This was especially so with the United States while it was neutral. During the first nine months of 1915, its exports of munitions exceeded the value of those in the corresponding period of 1913 by upwards of £32,000,000. But the protests of the German and Austrian governments were unavailing, and had no legal foundation, and the complaints

[1] Lawrence, *War and Neutrality in the Far East*, 2d ed., p. 179.

[2] Wharton, *International Law of the United States*, vol. III, pp. 512, 513.

[3] See the *Fifth Convention*, Article 7, and the *Thirteenth Convention*, Article 7.

of both powers were very inconsistent with their own previous policy; for in the Turco-Italian war of 1911, German munitions were exported in large quantities to Turkey, and in the Balkan wars of 1912–1913, all the belligerents drew the bulk of their supplies from German and Austrian markets.[1] Whether it would be well to alter this rule of International Law is a question far too wide to discuss in detail here. It has been ably pointed out that the problem of forbidding the export of munitions by neutral subjects is not merely one of ethics, but also of practicability.[2] As to the former, it is by no means disposed of by urging the hypocrisy of neutral subjects in praying for peace on Sunday and manufacturing the means of destroying it during the rest of the week. As to the latter, if a neutral state is to prohibit its subjects from exporting arms, it must embark upon an irritating and frequently ineffectual surveillance over their trade. But, making allowance for these difficulties, the indiscriminate manufacture and export of armaments ought to be checked if any real step towards peace in the world is to be made; and the check should begin in time of peace, and not when war has broken out. That the task is not impossible is shown by the efforts of states in the Convention for the Control of Trade in Arms and Ammunition, 1919, and in the plans for limitation of armaments in the Covenant of the League of Nations, 1919, and the Treaty limiting naval armament concluded at Washington, Feb. 6, 1922.] [3]

§ 236

The next of the heads under which we classify the duties of neutral states may be described as

*Duties of Prevention.*

It will be found to include more controverted questions than any of the others. Roughly speaking, the neutral is bound to prevent within its jurisdiction what the belligerent

[1] [Garner in *American Journal of International Law*, vol. x (1916), pp. 749–797.]

[2] [Garner, *International Law and the World War*, vol. II, ch. XXXV.]

[3] [See §§ 52, 221]

is bound to abstain from doing therein. But though this statement is accurate as far as it goes, it is by no means exhaustive; for neutral governments are, as we shall see, obliged by International Law to exert themselves in order to stop the consummation of certain acts when done by private individuals on their own initiative. And in all cases their action must be strong and resolute, not weak and perfunctory. Various attempts have been made to define or describe the standard of vigilance expected from them. By the Treaty of Washington of 1871 three rules were laid down, whereby Great Britain consented to be judged in the Arbitration on what were known generically as the Alabama Claims. The first and third of these declared it to be the duty of a neutral state to use "due diligence" in order to prevent various violations of its neutrality.[1] Immediately a controversy arose as to the true meaning of the phrase. Great Britain contended that due diligence "signifies that measure of care which the government is under an obligation to use for a given purpose,"[2] — an explanation which fails conspicuously to explain. The United States that it must be a diligence "commensurate with the emergency or with the magnitude of the results of negligence"[3] — an explanation which imposes a variable standard. The Arbitrators decided that it must be a diligence exercised by neutrals "in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil the obligations of neutrality on their part"[4] — an explanation which destroys impartiality. Much has been written on the subject since the award was given in 1872, but an authoritative standard of due diligence remains to be found. The attempt to find it was abandoned by the Second Hague Conference when it negotiated its Convention (No. XIII) concerning the Rights and Duties of Neutral Powers in Maritime War. The eighth article, which reproduces with a few verbal changes the first of the three rules of the Treaty of Washington, alters the words "A neutral government is bound

(2) Duties of prevention.

[1] *Treaties of the United States*, p. 481.
[2] British Parliamentary Papers, *North America*, No. 1 (1872), p. 24.
[3] *Ibid.*, No. 2 (1872), p. 43. [4] *Ibid.*, No. 2 (1873), p. 2.

to use due diligence" into "A neutral government is bound to use the means at its disposal," and a similar phrase occurs in the twenty-fifth article. Whether the substitute will prove more satisfactory than the original remains to be seen. Let us suppose for a moment that the law of a neutral state is lax in this particular, and confers on its government insufficient means of maintaining neutrality. How would its Minister of Foreign Affairs meet the argument of the aggrieved belligerent that a state is bound to arm its executive officers with powers sufficient to enable them to perform the obligations imposed on it by International Law? The zeal and vigilance required in such cases should, we venture to suggest, be the same as that which a well-governed state applies to its own internal affairs.

We must now pass on to deal with the various matters that fall under the head of duties of prevention. We begin by laying down the proposition that it is the duty of a neutral state *to prevent the use of any part of its territory for the naval or military operations of the belligerents, or the fitting out therein or departure therefrom of warlike expeditions organized in the interests of a belligerent.* The prevention of actual fighting is so rudimentary an obligation that it is not necessary to enlarge on it. The only statement that need be made here is that the vast extension in recent times of colonial dominions and protectorates renders it impossible for expansive states to police their remoter waters with the same efficiency as is expected and afforded in their home territory. Therefore the measure of care required of the United States, for instance, in the more distant islands of the Philippine group, ought to be less than would be demanded in Maine. But doubtless the standard will be raised as the possibility of effective control extends, and it will be held that increased vigilance should result from increased means, not only as to actual fighting, but also as to all matters a neutral state ought to stop or regulate. Among the uses of its territory a neutral is bound to prevent must be reckoned the setting up in it of a belligerent prize court, and the passage of the land forces of a belligerent across any portion of its soil. The former is expressly forbidden by the thirteenth

Hague Convention of 1907 and the latter by the fifth.[1] The necessary exceptions in favor of interned troops and convoys of wounded have already been considered.[2] The definite prohibition in a great law-making document of the passage of troops through neutral territory puts an end to a controversy which has lasted from the days of Grotius, who upheld a right of passage,[3] to recent times when the great majority of writers denied it. The question is on a very different footing as far as marginal waters are concerned. In discussing rights over them we came to the conclusion that territorial powers were bound to allow passage to all vessels of states with which they were at peace, when such waters were channels of communication between two portions of the high seas.[4] This right of innocent passage belongs to warships as well as to private vessels. But it is maintained in some quarters that the right of a neutral government to exclude the fighting vessels of belligerents from its ports and waters involves a right to deny them even innocent passage. The only point absolutely clear is that a neutral power may not close a narrow strait uniting two open seas, even though it possesses territorial sovereignty over the entire passage.[5] The Second Hague Conference contented itself with the cautious pronouncement that "the neutrality of a power is not affected by the mere passage through its territorial waters of warships or prizes belonging to belligerents."[6] [Holland, during the great war, refused to allow passage to belligerent warships through her maritime belt, and, in pursuance of this, interned a German submarine and a British submarine found therein. Sweden, Norway, and Spain, as we have seen, put more or less qualified restrictions on the use of their territorial waters by belligerent warships.][7] With regard to warlike expeditions, and the use of neutral land or water for the purpose of organizing them and fitting them out,

[1] See Articles 4 and 2 respectively. [2] See §§ 165, 232.

[3] *De Jure Belli ac Pacis*, bk. II, chs. ii, xiii, and bk. III, ch. xvii, 2.

[4] See § 88. [5] Higgins, *The Hague Conferences*, pp. 467–469.

[6] The *Thirteenth Convention of 1907*, Article 10.

[7] [See § 232. Oppenheim, *International Law*, vol. II, § 325. Garner, *International Law and the World War*, vol. II, § 562. Fauchille, *Droit International Public*, vol. II, § 1463.][1]

the conclusions we came to in the previous chapter as to belligerent duty have a direct application here. What the belligerent may not do in this respect the neutral must restrain him from doing if he makes the attempt. And the duty extends to private persons who endeavor to fit out such expeditions on their own responsibility, as well as to the belligerent state and its avowed agents. It also covers single ships. They are treated as warlike expeditions, if they are adapted for warlike uses and prepared for the purpose of making war in the interests of one belligerent against the other. In that case the neutral government is under an obligation to detain them. An instance of the strict observance of this obligation which is now common is to be found in the action of the British government with regard to the *Somers*, a torpedo boat under construction in England when the Hispano-American War broke out in May, 1898. It had been purchased by the United States about two months before, and in consequence its departure from British jurisdiction was prohibited.[1] The duty of a neutral power in this connection is set forth in the thirteenth Hague Convention of 1907, which declares that it "is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise or engage in hostile operations against a power with which that government is at peace." And further, the turning of a previously harmless vessel into one suitable for hostilities is aimed at in the words which declare that a neutral government is under obligation to use all necessary vigilance "to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which has been adapted in whole or in part within the said jurisdiction to warlike purposes."[2] These clauses bristle with contentious matter. They adopt the test of intent, which it is exceedingly difficult to apply. They leave the phrase "fitting out" unexplained. They do not say whether "arming" requires an armament so complete that the vessel is ready to commence hostilities at once, or whether the reception on

[1] U. S. Naval War College, *International Law Situations*, 1901, p. 145.

[2] See Article 8.

board of a few weapons would be sufficient. These and other questions for years vexed the peace of Great Britain and the United States in the long controversy which arose over the proceedings of the *Alabama* and her sister cruisers. Problems similar to them will no doubt arise in future, and in addition the position of fleet auxiliaries, such as colliers and repair-ships, will have to be seriously considered. When the time comes we may hope an International Prize Court will be in existence and ready to give them an authoritative solution. [A question that is sure to be a vexed one until some compromise is effected by an international convention is the nature and extent of a neutral state's duty with respect to belligerent aircraft. Is it bound to forbid their passage across the air-space above its territory, or to prevent them from engaging the enemy there? The best mode of discussing the question seems to be to indicate the points on which there is an approach to agreement, and then to present the difficulties which are yet unsolved. And first, there is no doubt that any injury done by belligerent aircraft to neutral land or water, or to persons or property on them, is a violation of the territory of the local sovereign for which compensation must be made. If there were nothing in international practice to show that this is so, the principles of the law of nations would settle it; for, be the nature of a new arm in warfare what it may, it must not be used so as to infringe neutral sovereignty. Nor among the conflicting views put forward by jurists as to sovereignty of the airspace is there one that is inconsistent with this rule. Even if we adopted the extreme opinion that the air is, like the high seas, open to navigation by all, yet no warship on the high seas may drop shells into neutral waters, and similarly no aircraft may drop bombs on neutral land or water. Practice during the great war reinforces this view, for on the several occasions on which neutral territory was bombed by mistake, it was never contended that there was any real justification for it, and apologies and reparation were usually made.

Beyond this we are in the region of doubt, and nothing can be stated as a definite rule of International Law. In theory, there ought to be no doubt that belligerent aircraft are under

a duty not to fight one another over neutral territory, and that a neutral state is under a corresponding duty to prevent such hostilities. As to the first of these propositions, the risk of injury from such combat to neutral life and property ought to be a sufficient foundation for it, and nothing can be urged against it except the theory that air navigation should be unrestricted; and it seems unlikely that this theory will ever prevail, as it is based on a misleading analogy between the high seas and the atmosphere, and was not accepted in the Convention for the Regulation of Aerial Navigation, 1919, which, as we have stated, is in effect limited to time of peace.[1] As to the second, it seems to be a plain corollary from the rule that a neutral state must not allow hostile operations to take place in its territory. But both these points are undecided. The cause of the uncertainty is the impossibility of stating how much of the air is part of a state's territory. An aerial battle did occur in 1917 over neutral Swiss territory, and during its course seven bombs were dropped, and both combatants were fired at by the Swiss, but without effect. Whether any further steps were taken to obtain redress for this as for a breach of neutrality does not appear.

It is equally doubtful whether belligerent aircraft violate neutral territory by crossing the airspace above it, and whether there is a corresponding duty on the neutral state to prevent them from doing so. At present, jurists seem to differ irreconcilably on the question as to what are the territorial rights of a state over the airspace in time of peace, and until there is some approach to unanimity on the answer to this question, any further problem arising out of it must remain unsettled. Such practice as there was during the great war does indicate a solution. Neutral states in general, and Switzerland and Holland in particular, loudly protested against the passage of belligerent airships and aeroplanes over their territory, and both the states named positively forbade it, and fired on aircraft that infringed the prohibition. Again, both the British and German governments by expressing regret that their aircraft had crossed neutral territory implied that they were

[1] [See § 73.]

under a duty to prevent them from doing so. Further, the Convention of 1919 mentioned above, though it does not in effect extend to war, and though it is concluded by certain powers only, nevertheless proceeds on the principle of territorial sovereignty over the airspace subject to a servitude of innocent passage by the aircraft of other states. If that principle comes to be universally adopted, it follows, first, that passage of belligerent aircraft is a breach of neutral territorial sovereignty, and secondly, that there is a corresponding duty owed by the neutral state to the other belligerent to prevent it. Such appear to be the tendencies of International Law, but it must be emphasized that they are as yet only tendencies.] [1]

The duty of neutral states *to prevent recruitment within their territory for the naval or military forces of a belligerent* must be considered next. The second Hague Conference forbade belligerent warships to complete their crews in neutral waters,[2] and for more than a century neutral governments have recognized an obligation to prevent anything of the kind. The United States made an exception in their Foreign Enlistment Act of 1818 in favor of subjects of the state owning the vessel, if they were transiently in American territory. But in the British Acts of 1819 and 1870 the prohibition was universal. In this form it has won through usage admission into International Law, with the addition that neutrals are bound to enforce it. They are also bound to prevent recruitment of men for the forces of either belligerent in their land territory. Agencies for that purpose may not be opened, nor corps of combatants formed.[3] The pronouncement of the Second Hague Conference in this sense registered the triumph of an enlightened opinion which had been gathering force for two hundred years. Vattel in the middle of the eighteenth century surrounded with conditions

[1] [The following authorities are a few among the many which may be consulted:— Spaight, *Aircraft in War*. Rolland in *Revue Générale de Droit International*, vol. XXIII (1916), pp. 497–604. Fauchille, *Droit International Public*, vol. II, §§ 1476[12]—1476[23]. Garner, *International Law and the World War*, vol. I, §§ 301–307. See also § 73 of this book.]

[2] *Thirteenth Hague Convention of 1907*, Article 18.

[3] *Fifth Hague Convention of 1907*, Articles 4, 5.

the old freedom on the part of the neutral to permit belligerent levies in its territory.[1] After him came publicists who condemned such permission in any circumstances. Gradually the practice ceased in its cruder form; but the rulers of small states sometimes covenanted to supply larger powers with a certain number of soldiers. At length in 1859 Switzerland, the last state to maintain contingents in foreign armies, consented under pressure to restrain its citizens from taking military service in foreign countries and to punish foreigners who attempted to enroll Swiss contingents.[2] Since then there have been cases when under the influence of popular enthusiasm for a great cause governments have winked at the departure of their subjects openly and in considerable numbers in order to enlist abroad among its defenders. Neglect to stop such proceedings when an armed conflict is in progress is an undoubted breach of neutral duty. But a state cannot be expected to prevent the secret departure of a few individuals.

We now pass on to a consideration of the duty incumbent on a neutral power *to prevent an undue stay of belligerent warships and their prizes in its ports and waters.* The stay of warships may be undue with regard to the number permitted in a neutral port at any one time or the length of the period during which they are allowed to remain. Fixed rules for these matters are comparatively modern. Neutral sovereignty involves a right of control, and of old each neutral dealt with them as occasions arose, the only limitation on its freedom of action being the elastic principle that it must not permit its ports and waters to be made into havens of rest or depots of supply for belligerent fleets. Sometimes a power declined to allow more than three warships of a foreign state to enter any of its ports at once in time of peace without special permission. At the Second Hague Conference this was taken as a rule applicable to times of war, and the thirteenth Convention of 1907 laid down that the maximum number of warships belonging to a belligerent which may be in one of the

[1] *Droit des Gens*, bk. III, § 110.

[2] Halleck, *International Law*, Baker's 4th ed., vol. II, p. 8, note 2.

ports or roadsteads of a neutral simultaneously should be three.[1] But it reserved power to the neutral government to make special provisions to the contrary. Consequently nothing further has been done than to obtain general recognition of a normal standard, which is doubtless an advance on the old laxity, but does not amount to the enactment of a definite rule. The question of length of stay is far more important, and must receive more detailed treatment. Not till 1862 was it made matter of formal regulation published beforehand, and then by one power only. In that year Great Britain, being neutral in the American Civil War, announced that no belligerent warship might remain in one of her ports longer than twenty-four hours, unless special permission was obtained for such a purpose as coaling or effecting repairs. Many other powers have since followed the British example; but France has never adopted it save in the case of a cruiser accompanied by a prize, and Germany has desired to confine a definite period to ports situated within the theatre of war, leaving neutrals at liberty to fix their own time with regard to more distant harbors. In 1907 the Second Hague Conference agreed after long discussion on the twenty-four hours rule for all ordinary cases "in default of special provisions to the contrary in the laws of a neutral power."[2] It thus indicated that the British practice [which was that generally adopted in the great war] might with advantage become undoubted law, but provided a means of escape from it in deference to the objections of a few powers. Even so Germany was not satisfied, and entered a reservation against the article, and also against the next, which provides that when a belligerent warship is in a neutral port at the outbreak of war, the neutral government must insist on her departure within twenty-four hours or such other time as it has prescribed by law.[3] Whatever may be the time allowed, the ship may not exceed it unless permitted to stay longer "on account of damage or stress of weather." If this happens, "it must depart as soon as the cause of the delay is at an end," or in default

[1] See Article 15.

[2] *Thirteenth Convention of 1907*, Article 12.

[3] See *Ibid.*, Article 13.

suffer internment.[1] [Several German warships, including a merchant ship acting as an auxiliary to one of them, were thus interned by the United States while it was neutral during the great war.][2] A further exception is allowed in the case of coaling "if, in accordance with the law of the neutral power, the ships are only supplied with coal twenty-four hours after their arrival." In such circumstances another twenty-four hours is given.[3] The Conference also prescribed the course to be followed when ships of both belligerents were present at the same time in the same neutral port or roadstead. If both were warships, it followed the old rule that has come down to us from the sixteenth century, and prescribed that twenty-four hours must elapse between their respective departures. It added that "the order of departure is determined by the order of arrival, unless the ship that arrived first is so circumstanced that an extension of its stay is permissible." If one of the ships is a man-of-war and the other a merchantman, the former must remain in the port for twenty-four hours after the departure of the latter.[4] With regard to the admission of prizes, neutrals practised a scandalous laxity not more than a century ago. Then followed a period of varying restraints imposed by each neutral as it thought fit. In 1862 Great Britain excluded prizes altogether, and since then she has followed the same rule when neutral. But many other maritime countries have not deemed it expedient to go so far; and at the Hague Conference of 1907 great differences of opinion were made manifest. The powers could not agree to surrender their liberty of action by imposing on themselves the British rule. The utmost they were able to do was to lay down that the only reasons which justified a belligerent in bringing a prize into a neutral port were "unseaworthiness, stress of weather, a want of fuel or provisions." To these was afterwards added the safe custody of the prize therein while it was awaiting the decision of a prize court sitting in the captor's country, and proceeding to adjudication on the

[1] *Thirteenth Convention of 1907*, Articles 14, 24.

[2] [Garner, *International Law and the World War*, vol. II, § 563.]

[3] See *Ibid.*, Article 19. [4] *Thirteenth Convention of 1907*, Article 16.

papers and not on the ship herself.[1] It is much to be regretted that any sanction was given to so irregular a course. Great Britain and Japan entered reservations against the article that allowed it. The only serious argument that can be urged in favor of it is that it tends to remove from belligerents the temptation to sink their prizes at sea. Probably political reasons had more influence on the decision than considerations drawn from the fundamental principles of neutrality. States which possessed few harbors in distant parts of the world were unwilling to give up the right of sending their prizes into the ports of any neutral they could persuade to receive them. If belligerent prizes are brought in for other reasons than those just given, the proceeding is irregular, and it is the duty of the neutral government to release them and intern the prize crews.[2] [Instances of prizes being taken into neutral ports occurred during the great war. German warships formed the practice of taking their captures into such ports, and staying there while they transhipped coal and provisions from them to their own holds. This was done with several of their prizes in the Chilean port of Juan Fernandez. The Chilean government protested against this as an outrage on its neutrality all the more flagrant because it was unable to watch a distant port like Juan Fernandez as closely as its continental territory. France claimed reparation from Chile for the loss of the *Valentine* in this way; but Chile replied that she had strictly complied with Article 25 of the thirteenth Hague Convention requiring a neutral power to exercise such vigilance as the means at its disposal permit to prevent a violation of its territory.[3] In the case of of the *Appam*, Germany found the consequences of abusing the neutrality of the United States more penal than those which she experienced at the hands of weaker neutrals. This vessel, a British liner, was captured and sent into a port of the United States with a prize crew on board, in 1916. The prize crew commander requested the internment of some of the *Appam's* passengers who

[1] *Thirteenth Convention of 1907*, Articles 21, 23.

[2] See *Ibid.*, Articles 21, 22.

[3] [Alvarez, *Guerre Européene et la Neutralité du Chili* (1915), pp. 239–242.]

had offered resistance to capture, but the United States set them free as well as the crew of the ship. On the other hand, not only were the prize crew detained, but the United States Supreme Court affirmed the decision of the District Court that the *Appam* must be released to the British owners. The case was held to be governed by Articles 21 and 22 of the thirteenth Hague Convention of 1907, which, as we have seen, allowed the entry of a prize into a neutral port only on account of unseaworthiness, stress of weather, or want of fuel or provisions. The *Appam* was brought into port for none of these purposes, but with the intention of laying her up there indefinitely. Nor was it material in the opinion of the Court that Great Britain had not ratified the Convention, for these two Articles of it embodied a principle entirely in accord with the policy of both the United States and Germany.][1]

In addition to the duties previously mentioned, a neutral state is bound *to prevent an increase of the fighting force of belligerent war vessels in its ports and roadsteads.* This wholesome rule had been generally recognized for a long time when the Second Hague Conference embodied it in a law-making document. The question of repairs is bound up with it, and the Convention of 1907 (No. XIII) on the Rights and Duties of Neutral Powers in Maritime War laid down that "in neutral ports and roadsteads belligerent warships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatever to their fighting force." [2] This is the old distinction, sadly illogical, but nevertheless useful for practical purposes. What fits a vessel to keep the seas also fits it to manoeuvre in an engagement, and overtake or escape an enemy. But nevertheless it is possible for experts to distinguish between repairs mainly concerned with navigation and repairs mainly concerned with fighting power; and as the Conference made the local authori-

[1] [*Berg* v. *British and African Steam Navigation Company* (1917), 243 U. S. 124. A report more accessible in some English libraries is in *Cases in the Supreme Court of the U. S.* (*Lawyer's edition*), Book 61, p. 633. See also Garner, *International Law and the World War*, vol. II, § 567.]

[2] See Article 17.

ties of the neutral state judges of what repairs are necessary, and provided that they must be carried out as quickly as possible, the danger of abuse is reduced to a minimum. If a belligerent ship comes into a neutral port in such a condition that a long time would be required to make her seaworthy, she should be disarmed before repairs are permitted, and detained in safe custody till the end of the war, when the work on her is finished. This was the course pursued in 1904, during the Russo-Japanese War, with regard to the Russian cruiser *Lena*, which put into the American port of San Francisco in a badly damaged condition; and in her case proceedings were simplified by a written request for internment from her commanding officer.[1] [While it was neutral during the great war, the United States faithfully observed the rule stated above.[2] Where the damage is incurred not by weather but by battle, and is only slight, it would seem that repairs may be effected, as the rule takes no account of how the damage is caused. At least, this was permitted by the Dutch.][3]

We must now deal with the neutral's duty *to prevent belligerent vessels from taking on board in its ports and roadsteads with undue frequency and in undue amount such supplies as International Law allows*. For all practical purposes these resolve themselves into provisions and fuel, for, as we have seen, all war material is strictly forbidden. Few questions have arisen about provisions. Both the British and French neutrality regulations of 1898 and 1904 allowed belligerent vessels to obtain supplies of what was necessary "for the subsistence of the crews." The Hague Conference of 1907 went further and limited the amount that might be taken on any occasion to what was sufficient "to bring their supplies up to the peace standard." [4] The local neutral authorities must be the judges of what this test allows. It would

[1] Takahashi, *International Law applied to the Russo-Japanese War*, pp. 455–457.

[2] [Garner, *International Law and the World War*, vol. II, § 563.]

[3] [Oppenheim, *International Law*, vol. II, § 333 (5).]

[4] *Thirteenth Convention of 1907*, Article 19.

in any case be a considerable quantity. Moreover, no limit was placed on the frequency with which replenishment might be permitted. On the other hand the neutral retains a right to refuse. With regard to fuel, the first thing to note is that the Convention on state neutrality in warfare at sea speaks as if it were coal and nothing else. But many navies are now using oil as well, and there can be no doubt that the provisions of the Convention will apply to it. Questions connected with fuel did not arise till steam superseded sails as the ordinary means of propulsion in the middle of the nineteenth century. The British neutrality regulations of 1862 declared that at least three months must elapse between any two supplies of coal to the same belligerent vessel in any British port, whether the same as on the previous occasion or a different one. Many powers adopted this rule, but France and several others declined to limit their action by it or any other hard and fast line, while they admitted a duty to grant nothing more than what was necessary for the proper navigation of the vessel. At the second Hague Conference the powers were able to agree on the British rule,[1] with the exception of Germany, who reserved the article which embodied it. This represented a general advance; but the rules adopted for the regulation of the amount of fuel that may be taken in at any one time by a belligerent war-ship in a neutral port are distinctly retrogressive, as compared with what was best in previous practice. Great Britain had in 1862 laid down for the first time that the maximum amount of coal she would allow on any single occasion to a belligerent warship was enough to enable her to reach the nearest port of her own country, and in 1904 at the beginning of the Russo-Japanese War she added as an alternative "some nearer named neutral destination." On the same occasion Egypt, doubtless at British instigation, went further still, and required the belligerent commander to sign a declaration setting forth the amount of coal he had on board, and promising that, if supplied with more, he would proceed direct to a port named in the declaration and previ-

[1] *Thirteenth Convention of 1907*, Article 20.

ously agreed on by him and the Egyptian authorities. In return he was to receive coal sufficient, in conjunction with what he had already, to take him to the port named.[1] It was afterwards stated that if the promise was broken and the coal used for cruising purposes, no more would be supplied to that particular vessel in any circumstances.[2] Further, when it was decided to send the Russian Baltic Fleet on its adventurous voyage to the Far East, the expectation that it would be permitted to coal at various neutral ports on its outward voyage was disappointed as far as Great Britain was concerned by a refusal of supply of any kind to a belligerent fleet or single belligerent warships "proceeding either to the seat of war, or to a position or positions along the line of route, with the object of intercepting neutral vessels on suspicion of carrying contraband of war." [3] Holland was the only power to issue a similar prohibition; but many others had adopted previously the rule of measuring the amount of the supply by what the vessel required in order to reach the nearest port of its own country. At the Second Hague Conference France, Russia, and Germany contended for the amount usually obtained in time of peace. In the end what we may call the British rule was adopted, with the addition that belligerent warships might "fill up their bunkers built to carry fuel, in neutral countries which have adopted this method of determining the amount of fuel to be supplied." [4] Thus there will in future be two rules instead of several. Great Britain and Japan made reservations against the article which embodied them, holding strongly to the view that the second alternative was much too lax. Doubtless the only rule consistent with a strict regard to the fundamental principle that no aid must be given to either belligerent is a rule which would recognize that coal is as much a munition of war as cartridges, though it is also susceptible of peaceful uses, and would accordingly prohibit any supply of it in neutral ports.

[1] British Diplomatic and Consular Reports, *Egypt*, No. 3229.
[2] Lawrence, *War and Neutrality in the Far East*, pp. 134, 135.
[3] British Parliamentary Papers, *Russia*, No. 1 (1905), p. 11.
[4] *Thirteenth Convention of 1907*, Article 19.

But the world is not ripe for such a drastic measure yet. Under present conditions of warfare and navigation it would practically forbid most of the great naval powers from carrying on hostilities in remote seas, and would give an enormous advantage to Great Britain, the only one among them which possesses coaling stations all over the world. But though the ideal is not attainable it is possible to reach it more nearly than the Hague Conference of 1907 succeeded in doing. The limitation of supply to the amount which will take the recipient vessel to the nearest port of its own country has proved workable in practice, and has the merit of a certain approximation to genuine neutrality. The public opinion of the civilized world ought to insist on its adoption with the addition of the significant clause "or some nearer named neutral destination." It might even go further and take notice of the immediate purpose of the vessel which demands the supply, so that the cruiser which is lying in wait for an unsuspecting enemy or the fleet which is on its way to a battle should no longer be put on the same footing in this respect with the ship which requires coal for the ordinary purposes of navigation. [Matters were complicated in the great war by the fact that many German merchant vessels shipped fuel in neutral ports, and transferred it to German warships on the high seas. The Chilean government regarded such vessels as auxiliaries to the German fleet, and, finding remonstrance useless, it interned them for abuse of its neutrality, and refused to allow supplies to be given to other ships owned by German companies whose craft had been thus interned. The chief offender was the Kosmos line. Ships of these companies were also not permitted to leave port. These measures, which were justified by the repeated misconduct of such companies, were later withdrawn owing to change of circumstances, but the ships did not depart and voluntarily declared themselves interned. Two British ships were also declared by the Chilean government to be auxiliary ships of the British fleet.[1] The United States adopted a still stricter policy and forbade the clearance of any vessel suspected of carrying fuel

[1] [Alvarez, *Guerre Européene et la Neutralité du Chili* (1915), Ch. VII.]

or supplies to any belligerent warship or tender, and punished with imprisonment the managing director and other officials of the *Hamburg-Amerika* line for procuring fraudulent manifests in order to evade this prohibition.][1]

Finally we may say that neutral powers are under an obligation *to prevent the use of any part of their territory as an information station by a belligerent.* This was recognized by the Second Hague Conference when in its Convention (No. V) on State Neutrality in Land Warfare it forbade belligerents to erect on neutral territory "a wireless telegraphy station or any apparatus intended to serve as a means of communication with the belligerent forces on land or sea," or "to make use of any installation of this kind established by them before the war on the territory of a neutral power, for purely military purposes and not previously opened for the service of public messages." [2] The Convention (No. XIII) on State Neutrality in Sea Warfare applied to neutral ports and waters the prohibition against the erection by a belligerent of wireless telegraphy stations or similar means of communicating with its land or sea forces.[3] Both Conventions declare that a neutral government ought not to allow any of the acts referred to above;[4] but the first left it free "to forbid or restrict the employment on behalf of belligerents of telegraph or telephone cables or of wireless telegraphy apparatus, whether belonging to it or to companies or to private individuals." If it took prohibitive measures or laid down restrictions, it was bound to apply them impartially to both belligerents, and to see that companies and private owners did the same.[5] The effect of all these provisions when taken together is to draw a broad line of distinction between means of sending information owned and controlled by the belligerent himself on neutral territory or in neutral territorial waters, and similar means owned and controlled by the neutral state or by private persons and com-

[1] [Garner, *International Law and the World War*, vol. II, § 561.]

[2] See Article 3.

[3] See Articles 5 and 25 respectively.

[4] See Article 5.

[5] See Articles 8, 9.

panies within its jurisdiction. Neutral governments are bound to prevent the erection of the former during the war, and the use of anything of the kind established before the war and not previously opened to the public for the transmission of messages. The latter they are free to deal with as they please on the sole condition that they act impartially as between the belligerents. Recent cases will illustrate the difference. In 1904, during the siege of Port Arthur, the Russians erected a wireless telegraphy station in the neutral Chinese port of Chefoo, and thus established communication with the beleaguered fortress.[1] Such an act is now expressly forbidden, and the duty of preventing it is laid on the neutral government. In 1898 "the cables from neutral points during the Spanish American War . . . did much in furnishing information which the scouting vessels were unable to obtain." We are told this on American authority,[2] and it shows conclusively that neutral powers would do well to exercise the discretion given them by the Second Hague Conference in favor of such regulation and restriction as proves to be possible. The prevention of open and unrestricted use of telegraphic or wireless communication would surely be feasible, though it would probably prove a hopeless task to stop the sending of warlike information in the guise of apparently harmless messages. France in her neutrality regulations of 1904 forbade to belligerent vessels in French ports "all enquiry as to the force, position, or resources of their enemies"; and it would be interesting to know how far these words were held to apply to the sending of telegraphic and radiographic messages. Portugal in 1898 discontinued that portion of her service which related "to the appearance, entrance, and departure of war vessels of all nationalities." [3] Without going to such a length as this, neutral states might manage at least to check the use of their means of communication for warlike purposes.

[1] Lawrence, *War and Neutrality in the Far East*, 2d ed., pp. 218–220.
[2] U. S. Naval War College, *International Law Situations*, 1904, p. 99.
[3] *Ibid.*, pp. 101–102.

§ 237

We must now direct our attention towards

*Duties of Acquiesence.*

(3) Duties of acquiescence.

Neutral states are bound to endure quietly a good many proceedings on the part of belligerents which could not take place in time of peace, but which nevertheless are perfectly lawful in time of war, however burdensome and annoying they may be to neutral subjects and their governments. They must, for instance, acquiesce in incidental damages sustained during legitimate warlike operations. Neutral property might be destroyed by artillery in the course of a battle or a siege, or a neutral traveller might be injured during an attack on a train containing soldiers, but neither the property owner nor the traveller would have a legal claim to indemnity, though compensation might perhaps be given by a belligerent particularly anxious to stand well with the country to which they belonged. But neutral governments are called on to fulfil their duty of acquiescence chiefly in connection with belligerent rights of search and capture at sea. This is always troublesome to neutral merchants, and may be very burdensome. To be deprived of opportunities of profit and subjected instead to severe loss rouses in those who suffer strong and loudly expressed resentment. Much pressure is thus brought to bear on the rulers of neutral states. But it is their duty to resist it, if the undoubted belligerent right to stop private vessels at sea under the neutral flag and examine into the nature and destination of their cargoes is exercised with due consideration. And if, when exercised, it leads to the detention and eventual condemnation of ship or goods or both, acquiescence still remains a duty, provided that the rules of International Law have been observed throughout. While breach of blockade, carriage of contraband, and performance of unneutral service remain offences against belligerents, and while the capture of private enemy property is still allowed in maritime warfare, no exception can be taken to seizures made accordingly. But if the law is exceeded in any particular, still more if it is flagrantly

broken, a watchful neutral government will at once intervene and demand reparation for its injured subjects. This will generally take the form of pecuniary compensation, for a sentence of a properly constituted prize court settles proprietary rights in the ship or goods before it. Should redress be denied, the neutral power must decide whether the question at issue is grave enough to justify war. Many of the most dangerous disputes that have arisen between neutrals and belligerents with regard to captures at sea have been caused, not by deliberate violations of admitted rules, but by differences of opinion as to the rules themselves. This is especially true of cases connected with contraband and blockade. But the law on these two important matters has been to a great extent elucidated by the Declaration of London of 1909, and the two Hague Conferences have cleared up many other questions. Further, we hope soon to establish an International Prize Tribunal, whose decisions as a Court of Appeal will determine with authority the law of the future on numerous points. By these means serious controversies as to the rules applicable to particular cases will be diminished in number and reduced in heat. Neutrals will know the exact limit of their duty of acquiescence, and honorable belligerents will not attempt to stretch it further than their rights allow.

§ 238

We must now go on to discuss

*Duties of Restoration.*

These arise only when a belligerent breaks the law and flouts neutral sovereignty to the detriment of its foe. If for instance it captures a prize within neutral waters a double wrong is done. Both the power whose authority is set at naught and the power which loses its vessel suffer through its misdeed. The injured belligerent must apply for redress to the neutral within whose jurisdiction the unlawful act was committed, and the neutral has a claim against the injuring belligerent for breaking the peace in contempt of its sovereign rights. The proper reparation, or

(4) Duties of restoration.

at least an important part of it, is the return of the prize to the spot where it was unlawfully taken. And when it has been given up to the power which was injured by its seizure, it should be restored by that power to those from whose custody it was originally snatched. Indeed, the duty of restoration goes further. The neutral ought to make every effort to obtain the return of the vessel. It must resort to diplomacy, but it need not rely on that alone; for if the ship is still within its jurisdiction, force may be used to take it from those who hold unlawful possession. The Hague Convention (No. XII) relative to the Establishment of an International Prize Court adds to diplomacy and force yet another means. It provides for an appeal to that court by the neutral power when the capture is alleged to have taken place in its territorial waters.[1] These proceedings are to be taken by the neutral in order to put it into a position to perform towards the other belligerent its duty of release and restoration. They are alluded to in the thirteenth Hague Convention of 1907.[2] Diplomatic request is regarded as the appropriate method, if the vessel is not within the jurisdiction of the neutral power; and an obligation to liberate the prize with its officers and crew on receipt of such a demand is laid on the belligerent who seized it. When there has been no departure from the jurisdiction, "all the means" at the disposal of the neutral are to be resorted to in order that the release of the prize may be effected. Moreover, the prize crew is to be interned. These provisions clearly contemplate the possibility of a resort to force. But the Convention does not lay on the neutral state an obligation to demand surrender, though it asserts the duty of the belligerent to give up its prize, if the demand should be made. It may, however, be maintained on good grounds that the neutral obligation in question is created by ordinary International Law. When the prize is set free its officers and crew are to be liberated along with it.

A second case for the exercise of the duty of restoration arises when a prize is brought into a neutral port in an irregu-

[1] See Article 4.

[2] See Article 3.

lar manner, that is to say for other causes than unseaworthiness, stress of weather, want of fuel or provisions, and sequestration pending the decisions of a prize court. The neutral power must not sit down quietly under the disrespect shown by the irregularity. It is bidden "to use the means at its disposal" to release the vessel "with its officers and crew and to intern the prize crew."[1] The release is but a preliminary to the handing over of the ship to the authority of the state from which it was captured; and the duty of effecting it is, therefore, properly described as a duty of restoration.

§ 239

The last class set of duties to be discussed in connection with state neutrality are

*Duties of Reparation.*

(5) Duties of reparation.

When a belligerent suffers through the failure of a neutral from ill-will or remissness to fulfil the obligations laid on it by International Law, a valid claim for satisfaction and redress arises. It is difficult, as we have seen, to define the exact measure of care and diligence the belligerent may rightly require from a neutral government,[2] but no one can doubt that indifference and carelessness may cause such detriment to the power which suffers from them as to give it a right to reparation. If proper precautions are taken and fail, no responsibility arises. Japan did not make any demands on the British government when in October, 1904, the torpedo boat *Caroline* escaped from the Thames, where it had been built, and reached Libau, where it was handed over to the Russian authorities. Its builders had been cleverly hoodwinked, and when suspicion arose and the the British Admiralty intervened, the vessel got away just in time to avoid seizure. But if nothing is done when the case is clear, or if action is unreasonably delayed, the neutral is bound to give reparation, though the violation of its own

[1] *Convention of 1907 concerning Neutral Rights and Duties in Maritime War*, Article 21.

[2] See § 235.

sovereignty has made it a fellow-sufferer in respect of the injury done. This was made clear by the famous Geneva Arbitration of 1872 on the case of the *Alabama* and her sister cruisers during the American Civil War. Great Britain was cast in damages three million pounds sterling on account of her negligence, in spite of being able to show that there was great difference of opinion among jurists as to the obligatory nature of much that was demanded of her. For the sake of peace she had consented to be judged by the three rules laid down in the Treaty of Washington of 1871;[1] and not till 1907 were they generally accepted as undoubted International Law by their practical embodiment in the Hague Convention (No. XIII) concerning Neutral Rights and Duties in Maritime War.[2] In very extreme cases, when the feebleness and folly of a neutral government makes its neutrality little better than a farce, a belligerent may be justified, if all other means fail, in acting as if it did not exist.

## § 240

The powers possessed by neutral states for the protection of their neutrality.

We will conclude our attempt to set forth the duties of neutral states towards belligerent states by indicating very briefly what are the powers possessed by neutral governments for the protection of their neutrality. They have first the remedy by diplomatic complaint. As a rule their remonstrances will obtain a respectful hearing; for it is to the interest of every belligerent to keep on good terms with the powers that take no part in the war. If the case is flagrant, and the wrong notorious and undoubted, adequate reparation will generally be accorded in answer to reasonable demands. Another remedy, which by no means excludes the former though quite independent of it, is to be found in administrative action, treading close on the heels of the wrong, and either preventing its completion or inflicting exemplary punishment on the wrong-doer. Thus, if a belligerent war-vessel tries to effect a capture in a neutral port, the authorities may

[1] See § 235.

[2] See Articles 6, 8, 25.

use whatever force is at their disposal for the purpose of frustrating the attempt. And if the aggressor is crippled or sunk in the course of the struggle, her commander has only himself to thank for the result of his attempt at outrage. It is constantly asserted that the neutral may in this connection pursue an offending vessel on to the high seas and there deal with it as justice may demand. But no clear authority for this statement can be found in general usage or in judicial decisions. Moreover, it seems inconsistent with admitted principle. A state has a right to police its own waters. But has it a right to enforce outside them the regulations deemed necessary for protecting the integrity of its territory? However, the view we hesitate to accept has in its favor the great authority of the Institute of International Law, which declared at its Paris meeting in 1894 that, in case of an offence committed within the jurisdiction of the territorial power, a pursuit commenced in its territorial waters might be continued on the high seas, with the condition that the right to follow and capture ceased if the fleeing vessel gained a port of its own country or of a third state.[1]

We come lastly to the remedy by judicial process. The neutral state has the right of exercising jurisdiction through its Prize Courts over captures made by belligerents within its dominions, whether the captured property remains from the first in the neutral waters where it has been illegally taken, or is brought back to them some time after the capture. The restoration is generally made by administrative act, but it is sometimes more convenient that the case should go before the neutral courts and be decided by them. Their jurisdiction extends also to cases where the capturing vessel has received either its original equipment for war or a subsequent augmentation of warlike force within the neutral's territorial waters, and has afterwards taken a prize and brought it into one of the ports of the injured power. This is clearly set forth in a large number of judicial decisions, the most important of which is that given by Judge Story in the case of

[1] *Annuaire de l'Institut de Droit International*, 1894–1895, p. 330.

*Santissima Trinidad*,[1] when he laid down, in addition, among other propositions, that the neutral's jurisdiction was limited to captures made during the cruise wherein the illegal outfit or augmentation of force took place.[2]

[1] Wheaton, *Reports of the U. S. Supreme Court*, vol. VII, p. 283.

[2] For a brilliant and lucid presentment of all the questions discussed by the Second Hague Conference in connection with the Convention concerning the Rights and Duties of Neutral States in Maritime Warfare, see the Report of Professor Louis Renault in *Deuxième Conférence Internationale de la Paix, Actes et Documents*, vol. I, pp. 295–330. For illuminating comments on the Convention, see Higgins, *The Hague Peace Conferences*, pp. 457–483, and Scott, *The Hague Peace Conferences*, vol. I, pp. 620–648. For the text of the two conventions on state neutrality constantly cited in this Chapter, see Higgins, *The Hague Peace Conferences*, pp. 281–289, 445–456; Whittuck, *International Documents*, pp. 143–150, 208–217; Scott, *The Hague Peace Conferences*, vol. II, pp. 400–414, 506–523; *Supplement to The American Journal of International Law*, vol. II, pp. 117–127, 202–216.

# CHAPTER IV

## ORDINARY NEUTRAL COMMERCE

### § 241

The conflict between belligerent and neutral interests in the matter of trade.

We have now to consider the Law of Neutrality in its second great division, which deals with belligerent states and neutral individuals.[1] In the Middle Ages the growth of trade forced commercial questions upon the attention of rulers long before the idea arose that states as corporate bodies had any duties towards one another in the matter of neutrality. The belligerent dealt with neutral commerce himself, and punished violations of the rules he laid down for the furtherance of his own interests. Then, as trade became more important and traders more influential, they began to demand that some respect should be paid to them; and after the decay of feudalism and the commencement of a new commercial and industrial epoch, states arose whose policy it was to extend the immunities of neutral merchants at the expense of belligerent rights. For three centuries at least trading interests have grown steadily stronger and stronger; and the result has been a continual modification of the older rules, and the growth of a body of law which is a compromise between the attempt of the belligerent state to cut off its enemy's trade and the attempt of the neutral individual to trade unhindered by the war. Opposing self-interests have been the main forces at work in the development of individual neutrality, just as ethical principles have been the chief elements in the growth of state neutrality. But nevertheless the rules which govern the ventures of neutral merchants and ship-owners possessed a clearness and symmetry which were lacking till lately when we turned to the mutual duties of neutral and belligerent states. The difference was due to the

[1] See § 228.

fact that the former were administered by Prize Courts and developed by trained jurists, who gave us, not indeed one great international system but, several national systems; whereas the latter were in the main left to be settled by the *ex parte* arguments of international controversialists and the slow growth of opinion among civilized peoples. But now they are developing in the direction of precision of statement and general recognition, owing to the labors of the Second Hague Conference in the negotiation of the Conventions we have considered in the two previous chapters.

Among the subjects which fall under the head of neutrality as it is concerned with the rights and obligations of belligerent states and neutral individuals, the first place must be given to what we have already called Ordinary Neutral Commerce. By these words we mean commerce uncomplicated by any question as to the kind of service performed by the ship concerned, or the warlike character of the goods conveyed, or the special circumstances of their port of destination. Under this head, therefore, we have to deal simply with the restrictions belligerents have endeavored to place upon harmless every-day trade, on the plea that they must be allowed to put all possible stress upon a foe, and the modifications contended for by neutrals, on the principle that they must be permitted to carry on their commerce unhindered by a war in which they are not concerned.[1] The special character of sea-borne commerce often renders it impossible to separate neutral and belligerent interests in it, and strike at an enemy without injuring a friend. On land few neutral goods are found in belligerent territory, and these are subject to the ordinary rules of warfare. The government of the country taxes them as it taxes the goods of its subjects, and an occupying invader requisitions them as it requisitions the goods of its enemies. But at sea, where there is no territorial jurisdiction to simplify matters, enemies' goods are often found on neutral ships, and neutral goods on enemies' ships. It is necessary, therefore, to settle in each case whether the element of neutrality or the element of belligerency shall prevail. Two principles have

[1] Dupuis, *La Guerre Maritime d'après les Doctrines Anglaises*, §§ 34–39.

found favor at various times as rough attempts to provide a workable compromise between the demands of warring navies and the claims of neutral commerce. The first lays down that the liability of the goods to capture shall be determined by the character of the owner, while the second declares that the character of the vehicle shall decide. These two principles, taken either separately or in combination, will be found to lie at the bottom of all the practical rules that have ever been enforced since attempts to cut off all neutral commerce with an enemy ceased, and rules of any kind were imposed on indiscriminate robbery.

§ 242

The history of the rules of ordinary maritime capture.

The Consolato del Mare, which was the greatest of the mediaeval maritime codes,[1] declared that if the captured vessel was neutral and the cargo enemy, the captor might compel the vessel to carry the cargo to a place of safety, paying her the freight she was to have received from the owners of the goods. If, on the other hand, the vessel was enemy and the cargo neutral, the owners of the cargo were at liberty to ransom the vessel from the captor and proceed on their voyage; and if they refused to do so, the captor might send the vessel to a port of his own country and make the owners of the cargo pay the freight they would have paid to the original belligerent owner of the vessel. But if they were willing to make satisfactory arrangements about the ship and the captor refused, they could claim from him compensation for damage and he could claim no freight from them.[2] These provisions proceeded on the principle that the fate of the goods depended upon the quality of the owner. If he were an enemy, they were subject to capture, even though they might be found in a neutral vehicle; if he were a neutral, they were free from capture, even though they might be found in an enemy vehicle. The rules of the Consolato were generally adopted in the Europe of the Reformation and the Renaissance, though other usages sometimes showed themselves. For instance, belligerents on some occasions made

[1] See § 20. [2] Pardessus, *Us et Coutumes de la Mer*, vol. II, p. 304.

serious efforts to prevent neutrals from trading at all with the enemy, and the doctrine that the neutral ship was tainted by the enemy cargo, the neutral cargo by the enemy ship, and the neutral part of a mixed cargo by the enemy part was invented in France, and put in practice in a few wars of the sixteenth and seventeenth centuries under the name of the doctrine of infection.[1] But on the whole states followed the plain and simple plan of capturing enemy goods and letting neutral goods go free, regardless of the nationality of the vessel in which they were found. And further, as civilization and trade advanced the obligation of bringing captured vessels in for adjudication by competent Prize Courts was universally admitted; and it was held that the courts must condemn the enemy goods while they released the neutral vehicle and paid freight to its owners, and also condemn the enemy vehicle while they released the neutral goods. This did away with that portion of the code of maritime capture contained in the Consolato which deals with the ransom of a belligerent prize by the neutral owners of her innocent cargo; but in other respects the system remained intact and became part of the common law of nations.

After a time, however, an alternative arose based upon a principle deemed to be more favorable to neutral commerce. It was suggested that the liability of goods to capture should be determined by the character of the vessel which carried them. If she were neutral, they were to go free, even though they belonged to an enemy; but if she were enemy, they were to be condemned, even though they belonged to a neutral. The new doctrine was set forth in the twin maxims, *Free ships, free goods*, and *Enemy ships, enemy goods*. The Dutch, its first advocates, adopted it on grounds of self-interest and commercial utility, recognizing that it was a new principle, which must be applied by special agreement if their commerce was to gain the benefit of it. The greater part of the carrying trade of Europe was in their hands during the seventeenth century, and the object they had in view was to obtain freedom from molestation for belligerent commerce intrusted to their

[1] Dupuis, *La Guerre Maritime d'après les Doctrines Anglaises*, §§ 41–43.

care. But, in order to gain what they desired, they were obliged to purchase safety for enemy merchandise beneath a neutral flag by conceding to belligerents a right to capture neutral goods beneath an enemy flag. Thus we find a long series of treaties stipulating for the adoption of the principle that the character of the vehicle settles the fate of the goods, unless indeed contraband of war be found on board a friendly vessel, in which case it is not protected by the neutral flag. The first was made between the United Netherlands and Spain in 1650,[1] and it was followed at irregular intervals by many others.[2] The United States from the commencement of their separate national existence showed their willingness to embody the newer doctrine in their formal international agreements. It occurs in the treaties of 1778 and 1800 with France, in the treaty of 1782 with the Dutch, and in the treaty of 1783 with Sweden.[3] The treaties of 1785 with Prussia and 1795 with Spain go still further and stipulate for the rule *Free ships, free goods*, without the corresponding rule *Enemy ships, enemy goods*; but in 1799, when a new treaty was negotiated with the former power, the previous agreement was replaced by a promise to observe "the principles and rules of the law of nations generally acknowledged," and in 1819 the obligation entered into with Spain was confined to cases where reciprocity was observed by neutral powers the goods of whose subjects were spared.[4] A complete return to the rule of the Consolato is found in the treaty with Great Britain of 1794, which expressly stated that the property of an enemy found on board a neutral vessel should be regarded as good prize of war.[5]

It is evident from these examples that the diplomatic policy of the United States has not been consistent. On the whole it has inclined strongly towards the freedom of enemy goods under the neutral flag; but in recent times the treaties have contained a proviso that the contracting parties will give the

[1] Dumont, *Corps Diplomatique*, vol. VI, part I, p. 571.
[2] Manning, *Law of Nations*, (Amos's ed.), bk. V, ch. VI.
[3] *Treaties of the United States*, pp. 301, 303, 326, 752, 753, 1044, 1046.
[4] *Ibid.*, pp. 902, 911, 1010, 1011, 1020, 1021. [5] *Ibid.*, p. 389.

benefit of this rule only to those neutrals who govern their own practice by it when they are at war.[1] Yet the older American jurists always laid down that in the absence of treaty stipulations the rule of the Consolato applies. Kent says of the agreements that free ships should make free goods, that such provisions "are to be considered as resting on conventional law merely and as exceptions to the operation of the general rule";[2] and Jefferson wrote in 1793, "I believe it cannot be doubted that by the general law of nations the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize."[3] The decisions of the Supreme Court were to the same effect. The attitude of the United States, therefore, has been that of a power which admitted the obligation of the old rules where they were not overridden by special agreement, but desired to see them superseded by the more modern doctrine. Great Britain, on the other hand, not only maintained the ancient law of maritime capture, but held it to be in itself just and satisfactory. Rather than give it up she faced the two great hostile leagues known as the Armed Neutralities of 1780 and 1800. She made very few treaties setting it aside in favor of the principle that the flag covers the cargo, and took the first opportunity of getting rid of any engagement of the kind into which circumstances had compelled her to enter.

Hitherto we have placed the principle of the character of the vehicle in sharp opposition to the principle of the ownership of the goods, as a means of determining their liability to capture. But it is quite possible to combine the two, and take as a guide to practice that part of each which is most unfavorable to neutrals, or that part which is most favorable to them. If we follow the principle of ownership when it bears hardly on neutral trade, we arrive at the rule that the goods of an enemy on board the ship of a friend are good prize; and, if we do the same with the principle of the nation-

[1] *E. g.*, the Treaty of 1887 with Peru, *Treaties of the United States*, p. 1196.

[2] *Commentaries* (Abdy's ed.), ch. viii, p. 318.

[3] Wharton, *International Law of the United States*, § 342.

ality of the vessel, we obtain the rule that the goods of a friend on board the ship of an enemy are good prize. Combining the two we reach the severe conclusion that *Enemies' goods in neutral ships and neutral goods in enemies' ships are liable to capture.* On the other hand, if we take that portion of the operation of each of our two principles which is most favorable to neutral trade, they work out into the rule that *Neutral goods in enemies' ships and enemies' goods in neutral ships are not liable to capture.* We see then that neutrals may be subjected to a combination of the more severe or the more lenient portions of each of the two main doctrines as to maritime capture. The harsher practice was followed by France in the sixteenth and seventeenth centuries, though sometimes she seems to have fallen back upon the rules of the Consolato, and in the latter part of the period she bound herself by several treaties to adopt towards the co-signatory powers the principle of the freedom of hostile property under the neutral flag. But when Louis XIV was at the height of his power he made the usual French practice harsher still by the famous Marine Ordinance of 1681, which is called by Azuni "le chef-d'œuvre de la législation établie par cet incomparable monarque."[1] It not only condemned neutral goods carried in enemies' ships, but also declared that neutral ships were liable to condemnation for carrying enemies' goods. The doctrine that enemy property infected with its hostile character whatever neutral property it was brought into contact with was followed by France till 1744, and by Spain from 1704 till the former date, when a French Ordinance gave freedom from capture to neutral vessels laden with enemies' goods and the Spanish Government changed its naval policy in accord with its powerful ally. The varying needs and circumstances of the great maritime struggle with England caused the French rules of capture at sea to vary with bewildering rapidity in the latter half of the eighteenth century and the first years of the nineteenth.[2] The termination of the conflict left France with her traditional policy of capturing

[1] *Droit Maritime de l'Europe*, vol. I, ch. iii, Art. 14.

[2] Dupuis, *La Guerre Maritime d'après les Doctrines Anglaises*, §§ 44–50, 54.

neutral goods in enemies' ships, without the added severity of the condemnation of neutral vessels for carrying enemies' goods, while England still adhered to the old practice of making prize of enemies' goods under a neutral flag. Thus when in 1854 England and France were allied against Russia there seemed no escape for neutral trade. But the two powers felt that it was neither desirable nor possible to revive the severities of a bygone age, and agreed that during the war they would not capture enemies' goods in neutral vessels or neutral goods in enemies' vessels.

This brings us to a combination of the more favorable aspects of the two great doctrines on the subject of maritime capture. An attempt was made in 1752, by the Prussian commissioners who reported to Frederick the Great on what is known as the Silesian Loan Controversy,[1] to show that the capture of enemies' goods on neutral vessels was contrary to the law of nations.[2] But their arguments were extremely weak, and it was admitted on all sides that the British reply shattered their case to pieces.[3] The Armed Neutralities of 1780 and 1800 endeavored to establish the rule of *Free ships, free goods*, without the logical accompaniment of *Enemy ships, enemy goods*.[4] The principles of the first Armed Neutrality had been accepted by all the chief continental powers when the peace of 1783 put an end for a time to the application of any rules of warfare at sea. But hardly had the French Revolution initiated the next great cycle of European wars, when Europe made haste to abandon the maritime code to which many of its states had pledged themselves a few years before. Again, however, the naval preponderance of Great Britain, and the severity with which she used it in the matter of colonial trade, raised a feeling of jealous hostility against her. Neutral states found that their commerce did not prosper as fully as they had hoped, and in 1800 Russia headed a movement which had for its object to cripple the principal maritime belligerent by reviving the Armed Neutrality of twenty years before.

[1] See § 174. [2] C. de Martens, *Causes Celèbres*, vol. II, cause première.
[3] Manning, *Law of Nations*, (Amos's ed.), bk. v, ch. vi, § 2.
[4] C. de Martens, *Recueil* vol. I, pp. 193, 194, and vol. II, pp. 215–219.

The Baltic powers joined the league; but within a few months it was broken up owing to the death of the Emperor Paul and the vigorous action of the British Government.[1] Then followed a period of confusion. Every European power was drawn into the conflict at one time or another, and some were at war with scarcely any intermission till the general peace of 1815. The signatories of the Armed Neutrality trampled as belligerents upon the doctrines they had championed as neutrals; while Great Britain and France vied with one another in attacks upon innocent commerce, each justifying its severities on the plea that they were adopted in retaliation for illegal acts committed by the other.[2] At the end of the struggle no definite code of maritime capture had received universal acceptance. It was left for peaceful agreement to bring about in another generation what force had failed to effect in the great world-conflict which centred round Revolutionary and Napoleonic France.

§ 243

The Declaration of Paris.

We have just seen how the states who were allied against Russia in the Crimean War pledged themselves at its commencement to act throughout it on the principle that they would capture neither the goods of an enemy in the vessel of a friend nor the goods of a friend in the vessel of an enemy, reserving, however, for the operation of the ordinary law cases of carrying contraband or attempting to run blockade. At the close of the war the powers assembled in conference at Paris agreed upon a Declaration concerning Maritime Law, which must not be confounded with the Treaty of Paris, though it was drawn up and signed by the same plenipotentiaries. Further, they pledged themselves to invite the accession of other powers, which was given with a close approach to unanimity. But a little group refused for various reasons to bind themselves. The most important of them, the United States, declined because the exemption of private property from capture at sea was not provided for.[3]

[1] Wheaton, *History of the Law of Nations*, part III, §§ 14–20.

[2] Manning, *Law of Nations* (Amos's ed.), bk. v, chs. vi, x, xi.

[3] See § 193.

China, Spain, and Mexico were the other dissentients, together with a few South American Republics. Of these, Spain and Mexico gave in their adhesion at the Hague Conference of 1907; and the United States have always acted as if they were a signatory power. There is, therefore, something barely distinguishable from general consent at the back of the Declaration. It was adopted on April 16, 1856, and two of its articles have a most important bearing on the question under discussion at the present moment. The second declares that "The neutral flag covers enemy's goods with the exception of contraband of war," and the third lays down that "neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag." [1] It will be seen that they give the sanction of general agreement to the principle that free ships make free goods without the usual corollary that enemy ships make enemy goods. The adhesion of Great Britain to this agreement marks the complete victory of commercial considerations over the rules of the Consolato del Mare. She had stood out long for the older and severer practice; but in the end she saw that her position as a great trading nation, disposed in the main to peaceful courses and therefore likely to be neutral in subsequent wars, rendered it advisable for her to accept provisions under which her commerce would gain immensely as long as she was not a belligerent. The vast growth of her carrying trade since 1856 has justified the foresight of her statesmen.[2] None of the powers which refused to sign the Declaration objected to its second and third articles. Those of them who have been engaged in war since 1856 have respected enemy goods in neutral vessels as well as neutral goods in enemy vessels. In the great conflict between North and South in the United States both parties agreed to observe all the articles of the Declaration except the first, and did in fact observe them all. The Hispano-American War of 1898 was waged between two non-signatory powers, but both of them acted on all the articles of the Declaration.

The freedom of enemy property from molestation under the flag of a friend is a concession made to neutrals; and in

[1] Higgins, *The Hague Peace Conferences*, p. 2. [2] See § 194.

respect of it two questions have been raised. The first asks whether belligerents who have signed the Declaration of Paris are bound to give the benefit of it to neutrals who have refused their signatures. We reply that such a privilege can hardly be refused, in spite of the statement in the last clause of the Declaration that "it is not and shall not be binding except between those powers who have acceded or shall accede to it." For in the period during which it has been in existence, it has been observed in all maritime conflicts. The unbroken usage of more than half a century can, therefore, be pleaded on behalf of the binding nature of its rules, and surely this is enough to establish them as International Law on the basis of general consent, quite apart from any question of formal accession to a law-making document. Non-signatory neutrals, who have themselves when belligerents acted upon the principle that the flag covers the cargo, would have reason to feel aggrieved should a power at war make the fact that they have not acceded to the Declaration an excuse for depriving their commerce of the protection it affords. In the Franco-German war of 1870–1871 both sides applied its principles to the property of American and Spanish subjects, though neither the United States nor Spain had signed it; and when the latter powers were themselves belligerents in 1898, they gave the benefit of the Declaration to all neutrals. A similar answer must be made to the further inquiry whether, when one belligerent has signed the Declaration of Paris and the other has not, the former is bound to act upon it in dealing with neutrals whose governments have acceded to it. There is room for doubt if we confine ourselves to the mere words of the document; but when we come to examine practice we find a strong tendency in favor of the more liberal interpretation. When England and France were at war with China, a non-signatory power, in 1860, they applied the second and third articles of the Declaration to neutral trade; and Chili and Peru did the same when they were allied against Spain in 1885.[1] Indeed, it is far more likely that the belligerent who has not acceded to the Declaration will be induced to observe

[1] Twiss, *Belligerent Rights on the High Seas*, p. 8.

its rules than that the belligerent who has acceded to them will feel free to ignore them. The war at the end of the nineteenth century between China and Japan affords an apt illustration. From its beginning in 1894 to its end, China, the non-signatory power, made no attempt to capture Japanese goods under a neutral flag or neutral goods under a Japanese flag, while Japan, the signatory power, showed no sign of a wish to ignore its obligations towards neutrals on the plea that they were not shared by China.

[Thus until the great war there was every reason to believe that the Declaration of Paris might be regarded as part of International Law, and even after hostilities had begun, the British Prize court referred to it in September, 1914 as "a recognized and acknowledged part of the law of nations." [1] But the executive was soon compelled by the force of circumstances to qualify the view taken by the judiciary. The rules of the Declaration relating to the capture of sea-borne goods rest, of course, on the basis that neutral commerce shall be hindered as little as need be. But the German government cut away the whole foundation of the rules not merely by hindering neutral transport, but by making it practically impossible with safety. They sowed mines broadcast, they indulged in reckless submarine warfare, and they declared great areas of the open sea to be "prohibited zones" where neutral navigation was either extremely perilous or safe only on humiliating conditions. It was idle therefore to expect adherence by the Allied Powers to the Declaration of Paris, for consistent enforcement of the German policy would have left very little afloat to which the Declaration could have applied. Consequently its second and third articles were overridden as a measure of reprisal by the British and French governments. What the legal position of the Declaration now is, it is difficult to say. If the German infractions of it, and the counter-measures of the Allied Powers could be regarded as mere incidents in an embittered struggle, which

[1] [*The Marie Glaeser*. L. R. [1914] P. at pp. 232–233. Cf. *The Bawean*. L. R. [1918] P. 58. *The Batavier II*. *Ibid*. 66. *The Dirigo*. L. R. [1919] P. 204.]

are not likely to recur in a future naval war, they need not be taken as seriously affecting the validity of the Declaration. Unfortunately the matter does not rest there. The real difficulty is a much wider one than that of a series of breaches of the law. Must not the law itself be changed to meet changed conditions? Are the rules of the Declaration adequate to the complete alterations in naval warfare foreshadowed in the great war? One such alteration will undoubtedly be the economic blockade, the effectiveness of which was proved during the world struggle, and the legality of which is implied by the League of Nations which adopts it as a weapon.[1] It involves the stoppage of all goods destined to a belligerent country, irrespective of the flag of the ship which carries them. Again, the tendency of modern warfare is to extend the list of contraband to a degree which makes it almost coincident with goods of every description. Lastly, although the submarine can never be a lawful weapon if it is used for the wholesale destruction of merchant vessels, regardless of the safety of crews, passengers, and ship papers, yet it is impossible to ignore the likelihood of increased destruction of enemy vessels in a future war, or to condemn it as illegal, provided the rules as to visit and search are observed, and especially those as to the preservation of life.[2] New rules seem to be needed to meet these circumstances, or at least the old ones may have to be modified. To say that, until these amendments are framed and adopted, Articles 2 and 3 of the Declaration of Paris are still law is to postulate something that may be verbally accurate, but is certainly nothing more.[3]]

## § 244

The Declaration of Paris [subject to the doubts raised in the last section] has deprived belligerents of the right to interfere

[1] [See § 221.] [2] [See § 203*a*.]

[3] [Cf. Piggott, *Declaration of Paris, 1856*, especially pp. 202–213. G. I. Phillips in *Law Quarterly Review*, vol. xxxiv, p. 63. H. S. Quigley in *American Journal of International Law* (1917) vol. xi, pp. 22–45. Oppenheim, *International Law*, vol. ii, § 177. Fauchille, *Droit International Public*, vol. ii, §§ 1531–1531.1]

with ordinary innocent sea-borne trade between their enemies and the rest of the world, unless it consists of enemy goods carried in enemy ships. Enemy ships engaged in carrying neutral goods may still be seized; and a prize court would condemn the ships while it released the goods. Their neutral owners would suffer greatly from delay and loss of market, but they would not be deprived of their property in the things themselves. We cannot, however, leave the matter here. It is not so simple as it appears. Even enemy ships and goods of certain kinds are exempt from capture, as for instance hospital ships, inshore fishing boats, vessels charged with scientific missions, postal correspondence, and books and works of art on their way to a public institution in the enemy's country.[1] On the other hand, quite apart from the difficulty of agreement among the nations as to the criterion of enemy property, vessels owned by neutrals and purporting to be neutral will be treated as enemy if chartered by the enemy, or sailing under his orders, or trading under a license from him, or even if they use habitually his flag and pass.[2] Great Britain backed by several important maritime powers still holds that if a belligerent throws open in time of war to neutrals a coasting or colonial trade which it confined to its own subjects in time of peace, its foe may treat all neutral merchantmen who take advantage of the permission as enemy vessels. Another group of powers, headed by the United States, holds strongly to the contrary opinion; and unless a settlement is soon reached, the question may become acute and dangerous in a great maritime war.[3] Another matter as to which differences of opinion are likely to arise is concerned with armed enemy merchantmen. Liners and other important vessels of great speed may possibly be sent to sea in future wars with one or two stern-firing guns in order to give them a chance of keeping at a distance in a chase an unarmored enemy cruiser. Would her armament disentitle a neutral merchant to send his goods by her? Or would they be liable to seizure and condemnation only if the

Present condition of rules of ordinary maritime capture.

[1] See §§ 182, 183.

[2] See § 181.

[3] British Parliamentary Papers, *Miscellaneous*, No. 4 (1909), p. 100.

merchant himself had aided in procuring the armament or making the resistance? The former is the English doctrine, the latter the American; and doubtless other states would take sides, if the case arose. We see here, as we shall see again in dealing with blockade and contraband, that the Declaration of Paris [assuming that it is still law] requires an authoritative commentary.

§ 245

Convoy.

We cannot leave the subject of ordinary neutral commerce without a brief notice of the controversy with regard to convoy. It produced two or three wars, was always threatening to burst out afresh, [and cannot even now be regarded as settled]. It arose out of the demand that neutral merchantmen should be free from belligerent search when under the escort of a warship or warships of their own country, whose commander was willing to pledge his word that nothing in the nature of their destination, or the character of any persons or things on board, rendered them liable to belligerent capture.

The first attempt to defeat in this way the ordinary belligerent right of search was made by Sweden in 1653. Peace supervened in a few months, and the question slumbered in consequence. It was not seriously raised again till the latter half of the eighteenth century, when the conduct of the Dutch roused it to vigorous life. As neutrals they claimed for their merchantmen exemption from belligerent search when under the convoy of their ships of war; and therefore as belligerents they were bound to grant to others what they had demanded for themselves. Accordingly in January, 1781, they ordered their cruisers to refrain from searching neutral ships under convoy, if the commander of the convoying vessel declared them innocent of offence.[1] Soon after a number of powers made mutual concessions of the privilege by special stipulations. The United States were among the foremost. Between 1782 and 1800 they agreed to the insertion of the provision under consideration in no less than six treaties.[2] And not

[1] Manning, *Law of Nations* (Amos's ed.), bk. v, ch. xi.

[2] *Treaties of the United States*, pp. 328, 725, 752, 903, 1046, 1091.

only have they continued this diplomatic policy; but they have also instructed their naval officers not to permit search of American vessels under their escort.[1] But, nevertheless, American writers and jurists have held that, though belligerents may by treaty contract themselves out of their common law right of visit and search, they cannot be compelled in the absence of such agreement to take the word of a neutral officer in lieu of the evidence of their own senses.[2] This was the British view, with the addition that any change in the law was to be resisted as dangerous. Great Britain therefore declined to enter into any of the agreements on the subject of convoy which were so common at the end of the eighteenth century, and insisted upon the full exercise of her belligerent right. This course of conduct brought her into sharp collision with some of the neutral states. The most important of these controversies arose in 1798 when a British squadron captured in the English Channel a number of neutral Swedish merchantmen under the escort of a Swedish frigate. They were condemned next year by Lord Stowell in a great judgment delivered in the case of one of them, called the *Maria*.[3] He held that the right of search was "an incontestable right of the lawfully commissioned cruisers of a belligerent nation," that "the authority of the sovereign of the neutral country being interposed in any manner of mere force cannot legally vary the right," and that "the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search." The resistance to search in this particular case was very slight. No shot was fired and no blood was shed, and yet the captured vessels were condemned. But there can be little doubt of the soundness of the legal doctrines laid down by the great English judge, whatever may be thought of the severity with which he applied them. The Danish jurist Schlegel, who attempted to argue against them, relied upon a distinction between a Positive Law of Nations and a Natural Law of Nations. He admitted that the former

[1] *U. S. Naval War Code*, Art. 30.

[2] *E.g.*, Wheaton, *International Law*, §§ 525–528; Woolsey, *International Law*, § 209.

[3] C. Robinson, *Admiralty Reports*, vol. I, pp. 340–379.

allowed the search and capture of neutral vessels; but asserted that the latter knew nothing of such a right, and based upon this presumed contradiction the conclusion that belligerents cannot have a greater latitude in this respect than neutrals consent to allow.[1] Influenced by arguments such as this, and by obvious considerations of self-interest, the Armed Neutrality of 1800 added to the four articles of its predecessor a fifth, to the effect that the declaration of an officer in command of a neutral ship of war that there was nothing contraband on board the vessels convoyed by him should suffice to prevent belligerent search.[2] The second league of the Baltic powers came to an end in June, 1801, when Russia signed a treaty with Great Britain which admitted the right of regular warships to search neutral vessels under convoy, but excluded privateers and stipulated for a special mode of procedure. The papers of the convoyed vessels were first to be examined on board the convoying vessel, and only if reasons for suspicion arose were the merchantmen themselves to be searched.[3] The constant shifting of sides in the great continental wars soon brought this treaty to an end; and when fresh arrangements were made they were silent on the subject of convoy. The matter was not mentioned in the Declaration of Paris; and the fact that the opposing views we have described remained unreconciled, opened out prospects of serious trouble in the future.[4] England still took her stand on the integrity of the right of search, while all the maritime powers of the European continent instructed their commanders at sea to rest content with the declaration of a convoying officer. When Japan emerged as a great naval power she adopted the continental position, and in 1894 applied it in her war with China. On the outbreak of the war with Russia in 1904 she again acted on it, with the provisos that the declaration of the officer in command of the convoy must be in

[1] *Visitation of Neutral Vessels under Convoy* (English translation published in London, 1801), pp. 67–70.

[2] C. de Martens, *Recueil*, vol. II, pp. 215–219. [3] *Ibid.*, vol. VII, p. 263.

[4] For an admirable historical account of the matter, see Dupuis, *La Guerre Maritime et les Doctrines Anglaises*, §§ 244–248.

writing, and that in cases of grave suspicion the immunity did not apply.[1] English statesmen gradually came to see that they could not insist on the right to capture neutral vessels under convoy against the opposition of the rest of the world, and a conviction of [what was at the time believed to be] its diminishing value helped to bring about a determination to abandon it. [It was thought] that as speed is an essential in most mercantile voyages, steamers would not wait while a convoy was made up, as sailing vessels did a century ago. Influenced by these considerations Great Britain, at the Naval Conference of 1908–1909, expressed her willingness to give up her old position, if reasonable securities against the abuse of the desired immunity could be obtained. These the other powers were quite willing to concede, and the following rules were laid down in the Declaration of London of 1909.[2] First the principle that "neutral vessels under national convoy are exempt from search" was laid down as the law of the future; and then the conditions and qualifications were stated. The commander of a belligerent warship is entitled to obtain in writing from the commander of the convoy "all information as to the character of the vessels and their cargoes that could be obtained by search." If this does not satisfy him, he must communicate his suspicions to the commander of the convoy, who must himself investigate the matter on the spot, and hand a copy of his written report to the commander of the warship. If it goes against the vessel, and the commander of the convoy deems her capture justifiable, he must withdraw his protection from her, and allow her to be seized by the belligerent cruiser. If the two officers disagree as to the character of the vessel or her cargo when the facts are before them, they can do nothing but part. The matter must then be left for diplomacy to settle. The plan thus outlined seems fairer and better in every way than the old crude demand that the mere word of the officer in command of the convoy must be accepted without demur. Proof such as he could have gained

[1] *Regulations Governing Captures at Sea*, ch. v, Art. 33, to be found in U. S. Naval War College, *International Law Topics and Discussions*, 1905, p. 197.

[2] See Articles 61, 62.

by the evidence of his own eyesight in a search must be laid before the belligerent commanding officer. If he is suspicious, he may be asked by the convoying officer to accompany him on his search, though he cannot demand to come as a matter of right. Palpable guilt will result in the handing over to him of the guilty vessel. Only in the event of a difference of opinion with the convoying officer as to the law applicable to the case must he hold his hand and retire unsatisfied.[1]

[The Declaration of London was never ratified, and the Dutch convoy case during the great war showed a marked reversion by Great Britain to her old position. In April, 1918, the Dutch government proposed to send to their East Indian possessions a convoy of two government ships and two ships requisitioned by the government, the one as a coal boat for bunkering purposes during the voyage, the other as a transport of government passengers and a cargo of government supplies for the authorities in the Dutch East Indies. The British government, however, notified the Netherlands minister that they could not consent to any abatement of the right which they claimed to search vessels under neutral convoy. "The repression of contraband and the enforcement of blockade," it was stated, "lie, by international law, with the belligerent alone and not with the neutral; and this fundamental principle Great Britain is quite determined to uphold with all the force at her command." But, in spite of this emphatic declaration of policy, the government were willing to concede as a matter of grace what they refused as a right, for the convoy was allowed to proceed without interference after an amicable arrangement had been made between the two states, which was substantially the same as that originally suggested by the Dutch.[2]]

It is generally agreed that a neutral cruiser ought on no account to offer convoy to the merchant vessels of either belligerent, and that neutral merchantmen attach themselves at their peril to a fleet convoyed by belligerent cruisers. In so

[1] *Report of the Drafting Committee of the Naval Conference.* See British Parliamentary Papers, *Miscellaneous*, No. 4 (1909) pp. 62, 63.

[2] [*British and Foreign State Papers* (1917–1918), vol. cxi, pp. 533–544, 541.]

doing they render themselves liable to capture by the warships of the other side. The act of sailing under belligerent convoy is in itself a violation of neutrality, and the vessel which is guilty of it may be condemned by a prize court, even though her voyage would have been perfectly innocent had she pursued it alone.

# CHAPTER V

## BLOCKADE

### § 246

The nature and history of blockade.

Blockade as a warlike operation governed by special rules is wholly maritime. On land it is always an offence to attempt to pass through the lines of an army without permission; and, if they happen to surround a fortress, the operation of ordinary rules cuts off all communication between it and the outside world. At sea, however, passage through a fleet is not usually interdicted; but naval belligerents claim a right to stop all intercourse between neutrals and an enemy port or coast-line which they are able to watch with a force sufficient to intercept and capture vessels attempting ingress or egress. There can be no doubt about the validity of this claim, though it amounts to nothing less than the interdiction of all neutral commerce, even the most innocent, in a given maritime zone. It has been sanctioned first by usage and then by express agreement. The submission of neutrals to so extreme a demand is probably accounted for by the fact that when it was first made they were familiar with attempts on the part of a belligerent to cut off all trade between them and its enemy. In such circumstances to confine the claim to blockaded ports and coast-lines savored more of concession than aggression.

Blockade as a systematized method of maritime warfare owes its origin to the Dutch. Grotius in 1625 hesitatingly allowed severities against those who introduced supplies into a port that was closed, when its surrender was imminent or peace was expected.[1] The States General in 1630 went much further, and denounced the penalty of confiscation of ship and cargo against neutrals attempting to enter or leave those ports of Flanders which the Dutch fleet was blockading, or

[1] *De Jure Belli ac Pacis*, bk. III, ch. i, 5.

found in such circumstances as to leave no doubt of their intention to attempt ingress, or captured after egress on their return voyage. They thus barred all trade with the blockaded places, whatever the nature of the goods, and made no limitation as to an expected surrender or peace. Moreover they asserted a liberty to capture on the high seas far away from the area under investment, if only the intention to enter or the fact of exit was proven by reasonable evidence.[1] From this time onwards blockade of some sort, as distinct from actual siege, became a frequent incident of warfare. Naturally there was at first a considerable amount of doubt about the new practice. But during the eighteenth century the courts and jurists of the leading maritime nations gradually elaborated a law of blockade. It was matter of general agreement that neutral governments must submit to the capture of their subjects' vessels and cargoes when a blockade was not merely proclaimed on paper, but maintained by an adequate force, though now and again attempts were made to exercise the right of seizure without the proper fulfilment of the condition on which it depended. Moreover the exact interpretation of that condition was often matter of dispute. On this and other questions differences arose between two schools of thought, which we may name after the protagonist on each side the English and the French. France gave voice to the prevalent opinion on the continent of Europe, and the United States adopted in practice British views. It will not be necessary here to do more than indicate the chief points of disagreement. They have been brought out with admirable clearness by M. Charles Dupuis in his excellent work on *La Guerre Maritime et les Doctrines Anglaises*,[2] and the French side of the controversy has been expressed with skill and vigor by M. Paul Fauchille in his *Du Blocus Maritime*. The Declaration of London, 1909, [if it had been ratified, would have] settled the questions in dispute by an equitable compromise. The most powerful maritime states of the world were parties to it, and Italy in her war with Turkey in 1911–1912 actually observed the rules of it. [But the Declaration never became

[1] Westlake, *International Law*, part II, pp. 257–259. [2] See chapter vi.

binding, and, though Great Britain, France, and Russia adopted it with slight modifications at the outbreak of the great war,[1] yet the two former powers abandoned it in 1916. Hence an outline of the history of the practices prior to 1914 is necessary.]

By the latter half of the eighteenth century the strength of Holland at sea had decayed relatively to that of Great Britain, and from being the strongest champion of the claims of belligerents she had become an advocate of neutral rights. Great Britain, on the other hand, had inclined to a wide interpretation of belligerent privileges as her naval power increased. Neutrals complained that she exercised the right of blockade with unwarrantable severity. They accused her of sometimes sending no adequate force to support her proclamations of closure, and of constantly carrying on her blockades by cruising vessels, instead of keeping her warships, as they contended she ought, stationed before the blockaded ports. The Armed Neutralities of 1780 and 1800 dealt with the matter. The first declared that no port should be considered blockaded unless there was evident danger in entering from the proximity of a belligerent squadron, but added that the blockading vessels must be stationary. The second repeated the words of its predecessor, and placed at the end of them the further restriction that a vessel approaching the blockaded port was not liable to capture unless she had been warned of the existence of the blockade by the commander of the force maintaining it and had afterwards attempted to enter.[2] The English government admitted that blockades must be maintained by a force sufficient to make ingress or egress difficult, but repudiated any obligation to keep their blockaders stationary or to give an individual warning to each approaching merchantman. They also claimed the right to capture at any point on the high seas vessels which could be shown to have a blockaded port as their destination with full knowledge that the blockade existed, and to make a seizure

[1] [*Manual of Emergency Legislation, 1914*, p. 143. *Supplement, 1914–1915*, p. 78.]

[2] C. de Martens, *Recueil*, vol. I, pp. 193, 194; vol. II, pp. 215–219.

during any part of the return voyage should a ship succeed in passing the lines of observation without being captured. In their view, as Professor Westlake tersely put it, the offence consisted not in passing a line of investment, but in communicating with a prohibited spot.

The powers of the Armed Neutralities soon abandoned as belligerents most of the principles they had striven to enforce as neutrals, and their doctrine of blockade was thrown overboard in the general clearance, though from it eventually arose the French practice of the nineteenth century, with its insistence on individual warning, its restriction of the area within which capture is permissible to the sea covered by the operations of the blockading squadron, and its repudiation of intention as the test of guilt. But at first a vast and unjustifiable increase in the severity of belligerents followed the failure of the attempt to settle the law of blockade in the interests of neutrals. In the Berlin and Milan Decrees of Napoleon, and the retaliatory Orders in Council of 1806 and 1807, France and England struck wildly at each other in utter disregard of the commerce of neutral powers. Great Britain placed in the position of blockaded ports all coast towns which excluded her commercial flag, and France declared the entire coast of the British Isles to be in a state of blockade at a time when she dared not send a single squadron to sea for fear of its capture by the victorious British navy.[1] The peace of 1815 gave an opportunity for passions to cool and reason to resume its sway over men's minds. The process of reflection removed difficulties, and in 1856 the fourth article of the Declaration of Paris gave the sanction of express consent to the generally accepted proposition that "blockades to be binding must be effective." The words that follow require an impossibility if they are taken in the strictest literal sense. They define an effective blockade as one "maintained by a force sufficient really to prevent access to the coast of the enemy." A small boat might frequently pass in the darkness of the night through the most numerous and efficient blockading force, and thus obtain the access the pre-

[1] Manning, *Law of Nations* (Amos's ed.), bk. v, ch. vi.

vention of which is made the test of effectiveness. It is, however, clear from the explanations given by the leading statesmen of the various countries which signed the Declaration that nothing further was intended than the assertion of the principle that there must be a real and pressing danger in any attempt to pass through.[1] The notion that the Declaration of Paris gave the sanction of general and express consent to the doctrine of blockade advanced by the Armed Neutralities will not bear examination. No doubt it insisted, as they did, on a blockading force sufficient to constitute a real danger to would-be blockade runners, but it did not add, like them, the requirement that the units of such force should be stationary. Had it done so, it would have abolished the operation it professed to regulate. A line of vessels anchored before a hostile port would be so easy a mark for torpedoes and submarines that after a few nights not one of them would be left. No state would risk its warships under such conditions. Either blockade would disappear from warfare, or, what is much more probable, the Declaration of Paris would disappear from the international statute book. Instead, it has received fresh adhesions, and is supported by an ever increasing weight of authority. And during the half-century of its existence the greatest blockade ever carried on by cruising vessels, that of the coast of the Southern Confederacy in the American Civil War, was acquiesced in by neutrals without a protest. Clearly the fourth Article of the Declaration covered blockades by unanchored cruisers, if only there were enough of them to render difficult and dangerous access to the port or coast-line they were told off to watch. It settled the question of effectiveness by permitting the British practice, which was also that of the United States, while it does not forbid observance of the requirements of the Armed Neutralities to any power that prefers to fulfil them regardless of the safety of its ships and men. It was silent as to the other matters in dispute; but the omissions which were necessary in 1856 were supplied in 1909 by the Declaration of London.

[1] Wheaton, *International Law* (Dana's ed.), note 233.

§ 247

It will be convenient now to describe the various kinds of blockade and explain certain terms which it will be necessary to use in giving an account of the law of blockade as set forth in the Declaration of London and modern usages consistent therewith.

The various kinds of blockade.

We have already seen what is meant by an *effective blockade*. It is well described in the United States Naval War Code of 1900 as one which is "maintained by a force sufficient to render hazardous the ingress to or egress from a port." [1] When such a force is in operation and the port is closed by it, there is a *blockade de facto*. When diplomatic notice has been given that certain ports or coast-lines are under blockade, there is a *blockade by notification*. When the notification is backed up by no force or an inadequate force, there is a *paper blockade*, which is in law no blockade, but a lawless attempt to injure neutral trade without right. A *strategic blockade* is one which is carried on with a view to the ultimate reduction of the place blockaded, whereas a *commercial blockade* has for its object the diminution of the resources of the enemy by cutting off his external commerce.

When a commercial blockade on a large scale is carried on with skill and efficiency, it inflicts much harm on neutrals, who are naturally inclined to be restive under it. Unbroken usage extending back for more than two centuries is amply sufficient to establish its legality; but the arguments of those who desire to see it forbidden by general consent have much force, and deserve careful consideration. In 1859 General Cass, then American Secretary of State, wrote that "the blockade of a coast . . . with the real design of carrying on a war against trade, and from its nature against the trade of peaceable and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times." [2] If we add to this the statement that in many cases the harm done by commercial blockades to neutrals is greater than the injury they

[1] See Article 37.

[2] Wharton, *International Law of the United States*, § 361.

inflict on the belligerent against whom they are directed, a strong case is presented. But the experience of the United States themselves shows that it may sometimes be outweighed by a stronger. Less than two years after the despatch quoted above had been written President Lincoln established the largest and most efficacious commercial blockade recorded in history. While the South had a vast seaboard and numerous ports, its territory touched but one neutral state, and that was poor and undeveloped. Little trade could come across the Mexican border; and when the fleets of the North were able to blockade effectively the entire coast of the Confederacy, few supplies from abroad could enter the country and few domestic products could go out to be exchanged for munitions of war. This isolation contributed powerfully to the triumph of the Union arms. Little blood was shed to bring it about, and yet it was more effective than many battles. Island states afford more striking illustration still. If it were possible for any power or combination of powers to blockade the coasts of Great Britain, she would be reduced to sue for peace in a few weeks from sheer hunger. On the other hand when the country whose ports are blockaded abuts on the territory of well-equipped neutral states, it would be able to obtain ample supplies by land, though at an enhanced cost. If every German port in the North Sea and the Baltic had been closed, the sixty-six lines of railway which cross her frontiers would have poured in all she needed [during the great war, provided the surrounding neutral states had been allowed to maintain their overseas trade subject to the restrictions usually associated with war]. [1] Moreover it is certain that with modern means of destruction no strongly held naval port could be hermetically sealed, though the supplies that reached it might be scanty. Nor could a commercial port in which there were well-handled submarines and torpedo craft be closed, except by the use of a very large force distributed in several cordons. While blockade may still be made into a most effective weapon in certain circumstances, in others it will be of little use, and

[1] Macdonnell, *Some Plain Reasons for Immunity from Capture of Private Property at Sea*, p. 10.

in any case it will require, in order to be maintained on a scale sufficiently large to affect the issue of the war, a force vastly greater than was the case a century ago. No power could attempt a commercial blockade of any magnitude unless it possessed a vast number of warships; and the attempt would not be worth making unless there was a strong probability that its success would reduce the foe to impotence for lack of the supplies it cut off. Yet if it did succeed in such circumstances, it would decide the conflict with the minimum of slaughter and destruction. It would be a mistake to prohibit entirely the use of so humane a weapon, especially as belligerents may be trusted in their own interests not to annoy neutrals by using it unless it is almost certain to be effective. In future this condition is not often likely to be fulfilled. We may expect commercial blockades to be fewer than in the past; but when they do happen they will bring into play enormous forces and produce far-reaching effects. [The events of the great war confirmed the author's opinion. They are discussed at the end of § 252.]

## § 248

The heads of the law of blockade.

In considering the modern law of blockade it will conduce to clearness if we arrange it under heads. Three were given by Sir William Scott in 1798 in the case of the *Betsy*,[1] and to make the classification more complete we will add a fourth. We thus obtain, first, the essentials of a real and binding blockade, second, the proofs of knowledge of its existence on the part of supposed offenders, third, the acts which amount to violation of blockade, and fourth, the penalty for breach of blockade. To distinguish these heads more emphatically we will put them in the form of questions, the answers to which will appear as explanations and elucidations.

[1] C. Robinson, *Admiralty Reports*, vol. I, p. 93.

§ 249

Our first question, then, is,

*What are the essentials of a real and binding blockade?*

What constitutes an actual blockade.

Our historical sketch has already shown us that what are called paper blockades are no longer recognized. We need not add further proof of a proposition which has been admitted on all sides for more than a hundred years. At the commencement of a blockade, neutral powers are not exacting in their requirements as to the force necessary to make it effective. But if, after a reasonable time has elapsed, their warnings remain unheeded, and the number of vessels stationed off the blockaded ports is obviously insufficient to close them, their governments will decline to recognize the validity of any captures of their merchantmen for breach of the so-called blockade, and will demand reparation for illegal seizures and condemnations. The occasional ingress or egress of vessels when the weather gives them special advantages, or if for any other reason they are able to pass through the lines of closure, does not render the blockade ineffective. All that International Law requires is that the attempt to run in or out shall be attended by manifest and pressing danger. Moreover, the vessels engaged in maintaining a blockade need not be stationed in close proximity to the port they close. The conformation of the coast, the nature of the channels, the set of the currents, and the neutral or belligerent character of the sovereignty exercised over the adjoining territory, are all elements in determining the position of the blockaders. In the Crimean War the port of Riga was blockaded by a single British vessel, stationed a hundred and twenty miles from the town in a narrow channel which formed the only navigable approach to the place.[1] A more recent instance occurred in the Hispano-American War of 1898, when the United States Supreme Court decided in the case of the *Olinde Rodrigues*[2] that one cruiser was enough to maintain an effective blockade of the port of

[1] Hall, *International Law*, 7th ed., § 260.

[2] Scott, *Cases on International Law*, pp. 835–844.

San Juan in Porto Rico, though it released the captured vessel on the ground that an intent to enter was not proved against her. It also laid down that effectiveness was a matter "more of fact than of law," thus anticipating the second Article of the Declaration of London, which declared that "the question whether a blockade is effective is a question of fact," and left it for the courts to decide. Another principle bearing directly on the establishment of a real and binding blockade was set forth by the eighteenth article of the same Declaration in the words "The blockading force must not bar access to neutral ports or coasts." Like the former it was not new in 1909, but had been for some time generally accepted as a corollary of the rule that blockades must not extend beyond the coasts belonging to an enemy or in his military occupation. In the American Civil War the Federal government did not attempt to include the mouth of the Rio Grande in its blockade of the Southern coast, because the middle of the stream formed the boundary between the United States and Mexico, and the Mexican port of Matamoras was situated within the estuary.[1] Moreover in 1870 the French took a similar course with regard to the Ems, and the Hanoverian ports on it which they deemed neutral in their struggle with Prussia.[2] Further, it is generally recognized that a blockade cannot extend beyond the area covered by the operations of the force which maintains it. This principle was laid down in the case of the *Stert*.[3] The court held that goods coming from a blockaded port by means of interior canal navigation which was perfectly open were free from hostile seizure. But it is not necessary that channels should in every case be closed by ships, though a maritime blockade without vessels to support it would be a contradiction in terms. As an operation supplementary to those of the fleet, a waterway may be closed by stones, sunken hulls, torpedoes, or other obstructions. When, in 1861, Earl Russell remonstrated on behalf of the British Government against the attempt made by the Federal forces to block up

[1] Wharton, *International Law of the United States*, § 359.
[2] Westlake, *International Law*, part II, p. 275.
[3] (1801) C. Robinson, *Admiralty Reports*, vol. IV, p. 65.

some of the approaches to Charleston and Savannah by sinking vessels in the channels, Mr. Seward replied that the obstructions were only temporary and would be removed at the termination of the war. He also disclaimed any intention to inflict permanent injury upon "the commerce of nations and the free intercourse of the Southern States of America with the civilized world."[1] But any form of closure which dispenses with ships altogether, whether it be lawful or unlawful, cannot be a blockade. In dealing with the instruments and methods of warfare we discussed the question whether automatic contact mines might be placed secretly off an enemy's port, and left without warning to destroy the first ship that passed in or out,[2] and we came to the conclusion that such a proceeding would be outrageous in itself, and in its consequences most dangerous to neutrals. We can only add here that it could not be brought under the law of blockade, which presupposes ships, as a marriage presupposes a bride or a sale a vendor. The only position it could occupy would be that of a new and nameless horror which ought to be banned forthwith by the emphatic condemnation of the civilized world. There is, however, one form of closure which is already forbidden by International Law. In case a state is attempting to put down a domestic revolt, it cannot shut up ports in possession of the insurgents by merely declaring them no longer open to trade. Great Britain maintained this position successfully in 1861 against both New Granada and the United States, and the United States themselves have maintained it again and again in their dealings with South and Central American Republics.[3] A state is free to exclude both foreign and domestic vessels from any harbor over which it actually exercises the powers of sovereignty. But when its authority is at an end owing to insurrection or belligerent occupation by a hostile force, it must fall back on warlike measures; and the only warlike measure which will lawfully close a port against neutral commerce is an effective blockade. [It is a vexed question whether blockade by submarines is

[1] Glass, *Marine International Law*, pp. 107, 108. [2] See § 203.
[3] Moore, *International Law Digest*, vol. VII, pp. 806–820.

lawful, or rather whether it is possible at all consistently with the basic principles of the laws of war and neutrality. As submarines were used by Germany during the great war, they were unlawful for blockade or any other purpose connected with merchant shipping. But if they could satisfy the requisites of blockade like surface men-of-war, there would be no objection to their use. At present they cannot do this, for they are too slow to escort the captured blockade-runner to port, and too small to supply a prize crew. The only other course is that of destroying the prize, and this in general is unlawful. It has also been pointed out that if they remain below the surface, as they usually must for safety's sake, it is difficult to see how neutrals can ascertain whether there is any blockade at all.[1]]

The Declaration of London not only reënacted the rule of the Declaration of Paris that a blockade to be binding must be effective,[2] but added the further condition that it must be declared and notified.[3] Great Britain had always recognized the necessity of conveying in some way to all concerned information of the existence of her blockades, and had in most cases made diplomatic notification of them. But she held that notoriety was equivalent to it, and regarded an effective blockade without notification as binding on neutrals, provided that the fact of its existence had become notorious in commercial circles.[4] This doctrine of notoriety did not find much favor on the continent of Europe, and was in truth capable of undue extension. [The ease of modern communication is a strong recommendation in favour of Article 9 of the unratified Declaration of London which requires that a] *declaration of blockade* must be issued either by a belligerent government or by a commander of a naval force acting on behalf of his state. It must specify (*a*) the date when the blockade begins, (*b*) the geographical limits of the coast

[1] [See authorities cited in Garner, *International Law and the World War*, vol. II, § 573, notes.]

[2] See Article 2.

[3] See Articles 8–13.

[4] *The Neptunus* (1799), C. Robinson, *Admiralty Reports*, vol. II, p. 114; *The Franciska* (1854), Spinks, vol. II, *Admiralty Reports*, pp. 131–134.

line under blockade, and (*c*) the period within which neutral vessels may come out. This last item is important, as it [would have turned] what was previously custom into law. Blockading powers have been wont to allow a period within which vessels found within a port at the commencement of the blockade might leave it, the length of time granted varying with circumstances and the will of the blockading authorities. [According to the Article] they must make the grant, though their option with regard to its extent is not taken away. The usual, though by no means invariable, British practice is to give fifteen days, which was the time allowed when England and Germany instituted a joint blockade of Venezuelan ports in 1902. In 1898 the United States allowed neutral vessels thirty days to leave the blockaded Cuban ports. [Nothing like this period was allowed during the great war, the days of grace varying from four in number to as few as two.[1]] Accuracy and precision in declarations of blockade are of immense importance. Neutrals have every right to know the exact extent of their liabilities. It is, therefore, provided by Article 10 that if the particulars as to date of commencement and geographical limits do not tally with the facts of the blockade, the declaration is null and void. Consequently the blockade is inoperative, and a new and accurate declaration is necessary. Meanwhile captures made for breach of blockade are illegal, and the vessels must be released. If the declaration omits to grant days of grace for neutral ships within the port, they must be allowed to pass out without molestation;[2] but the omission can be repaired at any time by a supplementary document. Declarations of blockade are not valid unless they are notified. A *notification of blockade*[3] must be made by the government of the state which establishes it to neutral powers, by means of a communication addressed to their governments or to their representatives accredited to the blockading power. It will then be the duty of the neutral authorities to warn their merchants and shippers. A second notification must be made by the commander of the blockading

[1] [Oppenheim, *International Law*, vol. II, § 377.]

[2] See Article 16.

[3] See Article 11.

force to the local authorities of the ports and places under blockade, and these latter must inform the foreign consuls within the blockaded district. The rules as to declaration and notification apply to any extension or restriction of the limits of the blockade, and also to cases where it has been voluntarily raised or is reëstablished after having been brought to an end by any means. We may add here that the blockading commander must apply his blockade impartially to the ships of all nations including his own. If he shows favor to those of any particular state, neutrals may remonstrate, and in the last resort decline to regard the blockade as valid. He may, however, give permission to a neutral warship to enter and leave a blockaded port, but is not obliged to do so; and in circumstances of distress, acknowledged as such by him, he is bound to allow any neutral vessel to enter and leave, provided that she does not discharge or ship cargo within the port.[1] [The declaration of London was, however, not ratified.]

A blockade ceases to exist when the war terminates, or when the government which has instituted it withdraws the vessels engaged in carrying it on, or when it ceases to be effective so completely that neutral governments decline to recognize it any longer. It is also terminated if the blockading squadron is defeated and driven off by a hostile force, or even if it is withdrawn for a chase or an action. It can, however, in any case except that of a peace, be reëstablished by the use of the formalities employed at its commencement, provided that an adequate force appears to renew it. But "a blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather." [2] It is now established that the occupation by a victorious belligerent of a place under blockade by another portion of its forces, puts an immediate end to the operations of the blockading ships, and renders illegal any further seizure by them of neutral vessels. The contrary doctrine was laid down by the Supreme Court of the United States in the case of the *Circassian*,[3] an English vessel which was captured

[1] See Articles 5–7. [2] See Article 4.

[3] Wallace, *Reports of the United States Supreme Court*, vol. II, p. 135.

and condemned in 1864 for attempting to run the blockade of New Orleans after the city had been taken by the Union forces. But the Mixed Commission, appointed under Article XII of the Treaty of Washington, gave compensation for wrongful seizure to the owners of the vessel.[1] It is evident that a right which can be exercised only against hostile places comes to an end when such places cease to be hostile. If a belligerent who has succeeded in occupying a port belonging to his enemy, wishes to shut it against neutral trade, he must do so by municipal closure, not by international blockade. But the occupation must be complete, and not partial, as was shown by the case of the *Adula*, a British vessel caught in an attempt to run into the Cuban port of Guantanamo during the Hispano-American War of 1898. The Supreme Court condemned her for the reason, among others, that when the capture was made the town was still in the possession of the Spanish troops, though the mouth of the harbor was held by the American fleet.[2]

§ 250

The next head to demand attention is connected with the mental condition of the supposed culprit. It may be discussed in the form of an answer to the question,

*How is knowledge of the existence of a blockade brought home to an offender?*

Something more than the establishment of an effective blockade is necessary in order to endow the blockaders with the right to capture vessels attempting to enter or leave the blockaded port. It is necessary that the existence of the blockade should be known to those who are accused of breaking it. Such knowledge is actual or presumptive. It is actual when it can be brought home by clear proof to the shipmaster concerned. It is presumptive when the surrounding circumstances are proved to be such that it would have been impossible, or barely possible, for him to remain ignorant. France and the group of powers

The knowledge of the party supposed to have offended.

[1] Wharton, *International Law of the United States*, § 359.

[2] Scott, *Cases on International Law*, pp. 826–835.

which adopted her views used to hold that before a vessel could be condemned for breach of blockade information must be given to her directly by an officer of one of the warships of the blockading force. That is to say, they insisted on actual knowledge of the most direct kind in every case. On the other hand Great Britain and her following maintained that knowledge must be assumed when a blockade had been diplomatically notified, or when it had become notorious, though they allowed the shipmaster to prove his ignorance if he could. Only in cases when it was clear he could not know did they give him the benefit of an individual warning endorsed on his ship's papers. In the Declaration of London the French school gave up their doctrine of the necessity of individual warning in every case, a concession which must be set against the surrender by the British school of their claim to effect a capture at any point in the outward or return voyage. The rules agreed on were just and reasonable, and would afford security to all who are *bonâ fide* ignorant, without impairing the efficiency of blockade. They contrast favorably with the complications of the British system and the lax simplicity of the French practice. [But it must be recollected that the Declaration of which they form part was not ratified, and it is subject to this qualification that we proceed to summarize them.] Actual knowledge subjects the vessel to capture and condemnation as a matter of course, provided that the blockade is effective and some act of violation has taken place. Knowledge is presumed if the vessel left a neutral port after the notification of the blockade to the territorial power and the lapse of sufficient time for the local authorities to publish it.[1] But the presumption is not absolute. Proof of ignorance may be given, and the prize court must decide whether it is conclusive. But if on the approach of a vessel to a blockaded port no knowledge, actual or presumptive, can be shown to exist, she is entitled to special notification from "an officer of one of the ships of the blockading force." It should be entered in her logbook, and should state the day and hour when the notification was given, and the geographical position of the

[1] *Declaration of London*, Article 15.

vessel at the time.[1] She is then turned back, and only if she attempts a second time to pass is she captured for breach of blockade. If a convoyed fleet of neutral merchantmen approaches in ignorance, the commander of the convoying force is warned, and it is his duty to see that the notification is entered into the logbook of each of the ships under his escort.

§ 251

We must now attempt an answer to the question

*What are the acts which amount to violations of blockade?*

Violation of blockade.

[The best way of answering this question is to state the variations in practice which existed until a reconciliation of them was attempted in the Declaration of London, 1909; to set out the rules of the Declaration; and to note that, as it was abortive, the older conflicting rules are still important.] According to French ideas the offence did not arise till an attempt was being made to run into the blockaded port or approach the blockaded coast-line, egress being on the same legal footing as ingress. Great Britain and the United States on the contrary claimed and exercised a right to capture any vessel against which could be proved either the intention to break a blockade or the fact of having broken it, provided that she was found before the termination of the return voyage at any point where hostile operations could be carried on lawfully. To put the matter in a nutshell, continental opinion made violation of blockade equivalent to crossing the blockade line; British opinion held it to consist in an attempt to reach the blockaded area. The weak points of both views were ably pointed out in the instructions given to the British delegation at the Naval Conference.[2] They were also informed that no case could be found of a vessel having been condemned by a British court for breach of blockade "except when actually close to, or directly approaching, the blockaded port or coast." It appears, therefore, that little or nothing was surrendered when Great Britain agreed

[1] *Declaration of London*, Article 16.

[2] British Parliamentary Papers, *Miscellaneous*, No. 4 (1909), pp. 25–27.

at the Conference to accommodate her principles to her practice, and accepted the rule that "neutral vessels may not be captured for breach of blockade except within the zone of operations of the warships detailed to render the blockade effective." [1]

It was well understood that this zone or area of operations might cover a wide extent of sea, if the blockaded port was skilfully defended, and possessed a geographical position which rendered the task of closing it effectively an impossibility for any but a large number of vessels. On the other hand it might be quite small if circumstances favored the blockaders.[2] Washington, for instance, might be blockaded by a few warships cruising between Cape Charles and Cape Henry, whereas New York would require cordon after cordon of vessels stretching far out into the Atlantic. But in any case the condition of effectiveness would prevent the extension of the area of blockade into distant seas. It must vary with circumstances, and it may in exceptional cases spread several hundreds of miles from the centre of operations. No attempt to close to trade a place situated on an open coastline could be really effective unless one of the lines of blockade had to be crossed by daylight; and as a swift blockade-runner can steam about three hundred miles during a long winter's night, at least that distance should intervene between the outer arc of blockading vessels and the next. Add to this that the line nearest to the shore must keep sufficiently far from land to avoid attacks from torpedoes and submarines, and we see what a stupendous undertaking a big blockade may be under modern conditions, and to what a distance out at sea its outlying scouts may be sent. The presence in the port of a well-found and well-handled squadron would make distances greater and increase the numbers of the blockading vessels. Certainly the rule of the Declaration of London does not confine to a small area the exercise of the belligerent right of

[1] *Declaration of London*, Article 17.

[2] *General Report presented to the Naval Conference on behalf of its Drafting Committee;* see British Parliamentary Papers, *Miscellaneous*, No. 4 (1909), pp. 41, 42.

capture at sea for breach of blockade, though it does save neutral powers from the risk of having their merchantmen seized on one side of the globe when they are making for a blockaded destination at the other.

The efficiency of blockade as a weapon in the hands of a power which has command of the sea would be in no way impaired by the rule we have discussed. When what we may term the neck of the bottle is the only spot that is watched, all approaching ships will be liable to seizure. In other cases the wide-thrown net of the blockaders will enclose a multitude of vessels. And it must be remembered that any blockade-runner that has tried to enter the closed port or succeeded in leaving it can be pursued by a unit of the blockading force, and may be captured as long as the pursuit continues. A temporary refuge in a neutral port cannot save the hunted vessel. Her pursuer can wait outside till she leaves it and then renew the chase. Moreover a chase may be begun by one of the blockaders and continued by another, and yet another, as long as all of them belong to the force engaged in carrying on the blockade. Only when the pursuit is abandoned, or the blockade raised during its continuance, is the right of capture lost.[1] But "whatever may be the ulterior destination of a vessel, or of her cargo, she cannot be captured for breach of blockade, if at the moment she is on her way to a non-blockaded port." [2] If, however, the innocent destination is a mere blind, and the ship does not intend to visit it, but is bound directly and immediately for a blockaded port, she may be seized, and will assuredly be condemned. The rule is directed against the application to blockade of the doctrine of continuous voyages,[3] under which in its modern form the ulterior destination of the cargo was considered, and if it could be shown that, after entering an open neutral port, it or any considerable part of it was to be sent on to a blockaded port in either the same vessel or another, ship or cargo, or both, were condemned. Under the Declaration of London, the blockading warships must wait till the second

[1] *Declaration of London*, Article 20.
[2] *Ibid.*, Article 19. [3] See § 257.

stage of the transit is proceeding, and the vessel is heading for the blockaded port and has entered their area of operations before they can effect a capture. They must not subject the neutral port to what has been well described as a blockade by interpretation. [We shall see later that the doctrine of continuous voyages was applied to blockade during the great war.[1]]

Ingress and egress are alike violations of blockade, unless the transit takes place during days of grace. In the case of egress, as we have already seen, a grant of a longer or shorter period in favor of ships found in the port at the commencement of the blockade is, according to the Declaration, compulsory. Whether the new rule covers cargo also is doubtful. Practice has varied from exit in ballast to exit fully laden, contraband goods alone being forbidden. In the Cuban blockade of 1898 the American courts construed the grant of thirty days' grace as a permission to come out with cargo laden within that period, and President McKinley confirmed this interpretation in his Proclamation of June 27, 1898, extending the original blockade to other Spanish ports.[2] The Declaration of London imposes on belligerents no obligations to permit ingress for a limited period after the commencement of a blockade; but they have sometimes granted it as an indulgence. When Great Britain and Germany established in December, 1902, a joint blockade of part of the Venezuelan coast-line, they allowed ingress to neutral vessels which had sailed for the closed ports before the notification of the blockade, during a time varying with the distance to be traversed and the character of the vessel as a steamer or a sailing ship. Loitering outside a blockaded port in order to take advantage of an opportunity to slip in, or to receive cargo from small craft which have penetrated the blockading line outwards, or to transship cargo to them that they may carry it inwards, has been hitherto regarded as a violation of blockade by many powers, and there seems no reason why it should not be looked at in the same way now, provided, of course, that the acts take place within the zone of operations of the blockading force.

[1] [See § 257.]

[2] *Proclamations and Decrees during the War with Spain*, pp. 76, 78.

§ 252

The last of our four questions asks

*What is the penalty for breach of blockade?*

The unratified Declaration of London gives the answer in the following words. "A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned, unless it is proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade." [1] It is impossible to add much to that terse and comprehensive statement. It may, however, be advisable to bring out that the penalty falls first and foremost on the ship, and only incidentally on the cargo. If the ship and cargo are owned by the same person or group of persons, both are condemned. If the ship and cargo are owned by different persons or groups of persons, again both are condemned, unless the owner or owners of the cargo can show that they did not possess, and could not fairly be expected to possess, any knowledge that the port of destination was under blockade. Their knowledge is always presumed, and the burden of proof of ignorance falls on them. If the master of the vessel starts for an open port and deviates to a blockaded port, he is held to do so in the interest of the ship, since he is the agent of its owner. But he is not the agent of the owner of the cargo. If, therefore, the two are different persons or different groups of persons, and the latter can show that at the time of the commencement of the voyage he was ignorant of the existence of the blockade, his goods will probably be released.[2] This was admitted in 1804, and the courts of the twentieth century are not likely to be more severe than their predecessors of the great Napoleonic struggle.[3]

[It remains to state the part played by blockade during the

[1] See Art. 21.

[2] *The Adonis* (1804) C. Robinson, *Admiralty Reports*, vol. v, p. 256.

[3] For the text of the Declaration of London, see Higgins, *The Hague Peace Conferences*, pp. 540–566; Whittuck, *International Documents*, Appendix, pp. 254–274; *Supplement to the American Journal of International Law*, vol. III, pp. 186–220. For a discussion of that part which deals with blockade, see Dupuis, *Le Droit de la Guerre Maritime*, ch. VI.

great war, and, if possible, to estimate the effect of it on the law supposed to exist in 1914. We can begin by separating the blockades which were normal from those which were not. The former can be dismissed with a few words, for in general they conformed to the requisites of the Declaration of London and gave rise to no controversy. Such were the blockades in 1914 of Kiaochau by Japan, and of Montenegro by Austria; and in 1915 of German East Africa by Great Britain and France, of Asia Minor and Syria by France, and the Anglo-French blockade of Bulgaria. Two other operations were probably not blockades at all. One was the "blockade" of Greece while that state was nominally neutral. This we have suggested was nothing more than an incident in the wider measure of intervention there.[1] The other was the so-called German "blockade." The term was misapplied in some British diplomatic documents to the German proclamation of "prohibited areas" of the high seas guarded by mines and submarines. The Germans themselves did not regard this measure as a blockade, and indeed it lacked every essential of that process in its true sense, including that of effectiveness, for during the first eighteen days of it over 600 ships reached the "blockaded" English ports, and nearly ten times that number cleared from them.[2]

We now pass to abnormal practices, which in extent and importance entirely dwarfed the normal blockades. They originated as a retort to the unlawful acts of the German government which declared the English Channel, the North and West coasts of France, and the waters round the British Isles to be a "war area," and stated that all enemy ships found in that area would be destroyed and that neutral vessels might be exposed to danger. The British and French governments replied to this by notifying neutral states on March 1, 1915, that they would "hold themselves free to detain and take into port ships carrying goods of presumed enemy destination, ownership, or origin." They stated that this was a retaliatory measure, and that such vessels or cargoes would not be con-

[1] [See §§ 64, 138.]

[2] [Garner, *International Law and the World War*, vol. II, §§ 509–510.]

fiscated unless otherwise liable to condemnation.[1] The United States, as the principal neutral concerned, at once protested against this. They pointed out that, though the right claimed really pertained to blockade, yet ships and cargoes were to be treated as if no blockade existed.[2] The pith of their objection to the British note was (1) that it really involved the blockade of neutral ports, and (2) that it was unfair in its application because it left the Scandinavian and Danish ports free to trade with the German Baltic ports. The United States government admitted that the great changes in naval warfare had made the old "close" blockade, with its cordon of ships in the immediate offing of the blockaded ports, no longer practicable against an enemy with submarines, mines, and aircraft at its disposal; but they insisted that this was no excuse for blockading in effect neutral ports against lawful neutral traffic by means of a cordon of blockading warships cruising at a great distance from enemy ports.[3] The British government replied that they could not agree with the contention that if a belligerent could get what he wanted through the ports of an adjacent neutral country as easily as through his own ports, his opponent must therefore stand by and let him get it. And they reminded the United States that this was precisely what the American government had prevented in the Civil War of 1861–1865 by applying the doctrine of continuous voyages to contraband trading. This was the method then adopted for capturing cargoes in ships which made a pretence of *bonâ fide* voyages to neutral ports close to the blockaded coast, when in fact their object was to transfer the goods to a blockade runner.[4] It was an extension of the law of blockade to meet changed circumstances, and the British government argued that a further change in circumstances justified a new departure. Germany's network of railways and waterways connecting her with neutral countries enabled her to flout a blockade of the old type, unless the Allied Powers extended it so as to prevent the goods from reaching the neutral countries in the first instance. It might

[1] [*British and Foreign State Papers* (1915), vol. CIX, pp. 801–802.]
[2] [*Ibid.*, p. 803.] [3] [*Ibid.*, pp. 809–815.] [4] [See § 257.]

mean hardship to neutrals, but the American doctrines applied in the Civil War had borne hardly on the British who were neutral then. Moreover, the British government did its best to alleviate the plight of neutrals in 1915 by endeavours to distinguish between enemy and genuine neutral commerce.[1] As to the alleged inequality of the blockade in the case of the Scandinavian countries, Great Britain urged that the passage of commerce to a blockaded area across a land frontier or inland sea (like the Baltic) had never been held to interfere with the effectiveness of a blockade.[2]

We cannot here go into the various methods by which the Allied Powers tried to separate honest neutral commerce from disguised enemy commerce. They were numerous and none was wholly successful. Perhaps the most notable was the persuasion of neutral traders, who imported goods, to form themselves into associations, and the permission of goods destined to these associations to go unmolested provided that the associations undertook to allow neither the goods nor their proceeds to reach the enemy. The Netherlands Over-seas Trust, one of these associations, seems to have done its best to abide by its guarantee. The temptation of enormous profits appears to have been too strong in other cases to hold men to their promises.[3]

No settlement of the controversy between the Allied Powers and the United States was effected, and the entry of the latter into the war as an ally of the former naturally left the question in abeyance. Whether the Allied Powers were acting lawfully in taking the measures that they did is open to argument. But it is submitted that on the whole they were right. The matter appears to resolve itself into two inquiries:—(1) Were the measures lawful in themselves apart from any idea of retaliation? (2) If they were not lawful otherwise, could they be justified on the ground of retaliation? On the first point, there seemed to be a dilemma. If the Allied Powers adhered to the old law of blockade, they must stand by help-

[1] [*British and Foreign State Papers* (1915), vol. cix, pp. 826–831.]
[2] [*Ibid.* (1916), vol. cx, p. 673.]
[3] [Garner, *International Law and the World War*, vol. ii, §527.]

lessly watching their enemies get all the supplies they needed; in other words, a blockade was perfectly futile. If, on the other hand, they adopted the "long range" blockade, they made an innovation in practice which interfered to an exasperating degree with neutral commerce. Now, law of any kind is worse than useless if it cannot develop with the changing needs of the community of individuals or states which it governs. And the law of blockade as it stood in 1914 was quite inadequate to meet the needs of a belligerent in naval warfare of the present day. This was practically admitted by the United States, who throughout the discussion showed creditable restraint. There was therefore a presumptive case made out for amendment of the law. But it is a law which affects not only belligerents but neutrals, and unless some sort of balance is struck between their competing claims, it is hardly worth while to remain neutral in a war. A belligerent cannot be expected to allow a neutral country which adjoins the opposing enemy country to take in ten times the amount of imports which it obtained before the outbreak of war, with the certain knowledge that ninety per cent of these will pour into the enemy country. On the other hand, a neutral cannot be expected to have the whole of its pre-war trade interrupted. A workable mean between these two points of view would be to allow the neutral at least his pre-war scale of imports and to let him receive all goods required for his own needs and for *bonâ fide* trade with other neutral countries. The problem is to get some moderately efficient machinery which will draw the line between such trade and trade in goods which are to be passed in their original or altered form to the other belligerent. And if the methods adopted by the Allied Powers during the war can be improved in this direction, it is suggested that their innovations in the law of blockade ought to be regarded as lawful.

If this be the correct conclusion, there is no need to consider whether the long range blockade was justifiable by way of retaliation. For retaliation implies doing some act which would be unlawful if it were not excused as a counter-measure against unlawful conduct of the enemy; and it is submitted

that the long range blockade is lawful subject to the qualifications which we have put forward. If however this view is not accepted, then there is not the slightest doubt that as regards Germany the Anglo-French operations were lawful as a retaliatory measure.[1] The German declaration of the "war area" to which we have referred was a flagrant outrage on the laws of war and neutrality. With respect however to neutral powers, the matter rests on a different footing. Retaliation should be limited to one's enemy, and should not affect neutrals. How, it has been asked, can you retaliate against neutrals who have never injured you? You cannot. But the rule of course assumes that the act which you are doing is unlawful *per se*, and we have indicated that the action of the Allied Powers was lawful in any event. Even if it were not, it had some moral justification, for we might retort to the question above with another. How can you expect to have any International Law at all, if neutrals will not see to its preservation? If they fold their arms whilst the worst breaches of the laws of war are being committed, no doubt they are within the letter of the law. But what moral right have they to insist that none of the measures taken to redress those breaches shall interfere with them in any way? It is probable that the more drastic acts of the Allied Powers would never have been necessary if neutrals had interfered earlier to punish the state whose outrages caused those acts.[2]]

[1] [Cf. *The Stigstad.* L. R. [1919] A. C. 279. *The Leonora. Ibid.*, 974.]

[2] [See generally Garner, *International Law and the World War*, vol. II, ch. XXXIII. Oppenheim, *International Law*, vol. II, § 390*a*. Fauchille, *Droit International Public* §§ 1656[20]–1656[26]. H. W. Malkin in *British Year Book of International Law* (1922–1923), pp. 87–98.]

# CHAPTER VI

## TRADE IN CONTRABAND OF WAR

### § 253

The nature of contraband of war.

Every belligerent may capture goods of direct and immediate use in war, if he is able to intercept them on their passage to his enemy. In the nature of things he can do this at sea only, since it is unlawful to perform acts of war on the territory of a neutral power. If a case should occur of the transport of arms and munitions of war to an enemy over land unappropriated by any civilized state, they might no doubt be seized in transit by the forces of the other side. But such circumstances are so improbable as to be practically impossible. We must look on the capture of contraband as an operation of maritime warfare, and it is always discussed as such. The law with regard to it was a gradual growth. We find the germ of it in declarations and treaties of the sixteenth century, when belligerents sometimes regarded all trade between neutrals and the enemy as an offence, and a claim to seize certain articles only appeared as a mitigation of so extreme a severity. From the beginning there were two currents of opinion, one in favor of the prevention of neutral trade in weapons and munitions of war, and the other in favor of a prohibition of all supplies which might be useful in any way for warlike purposes.[1] Curiously enough, in this case as in that of blockade, two powers gradually became prominent in working out and putting into practice the opposing views, and they were the same two which had occupied similar positions in the moulding of the law of blockade. We may carry the parallel a step farther and add that with regard to this matter, too, a reconciliation [would have been effected if the Declaration of London, 1909, had been ratified; for England and France both signed it].

[1] Westlake, *International Law*, part II, pp. 277–278.

For a clear, learned, and somewhat detailed statement of the differences and the final agreement between them, we must refer our readers to the account given by M. Charles Dupuis in his valuable works, *La Guerre Maritime et les Doctrines Anglaises* and *Le Droit de la Guerre Maritime*.[1] We may say at once, in order to make what follows intelligible, that from the beginning England stood for the doctrine that other objects than arms and munitions of war could be treated as contraband when surrounding circumstances showed that they were destined for the warlike uses of the enemy, while France upheld the view that nothing was contraband but what had no use except for war. The remarks of Grotius on the subject[2] show that at the beginning of the seventeenth century the law of contraband was in its infancy and had hardly begun to be distinguished from a law of blockade. During the latter half of the seventeenth century we find important treaties which accentuate the differences we have remarked on. In the eighteenth century the decisions of prize courts reduced the opposing views to system, and gave to them legal shape. The nineteenth century was a century of definition and discussion, and the twentieth began as a century of reconciliation, [but during the great war the law was thrown into confusion again, as will appear in the following sections].

## § 254

The rudimentary nature of the notions as to contraband found in the early documents is well illustrated by a clause in the Treaty of Whitehall of 1661 between England and Sweden. After stipulating for a list of contraband which contains many articles other than arms and munitions of war, it goes on to pledge each of the contracting parties not to permit its subjects to give aid to the enemies of the other by lending or selling ships or being useful in any way connected with the war.[3] This is diametrically opposed to modern ideas. It has been held for at least a hundred and fifty years that neutral mer-

Neutral states are not bound to stop contraband trade on the part of their subjects.

[1] See chapter VII.

[2] *De Jure Belli ac Pacis*, bk. III, ch. I, 5.

[3] Westlake, *International Law*, part II, p. 281.

chants may trade in arms, ammunition, and stores of all kinds, in time of war as well as in time of peace. There is thus a conflict between the right of the belligerent state to capture such goods and the right of the neutral individual to trade in them. Modern International Law makes a compromise between them by allowing the subjects of neutral states to carry contraband to either belligerent, but insisting that they do so at their own risk. Their government is not bound to restrain them from trading in the forbidden goods, but neither has it any right to interfere on their behalf if the articles are captured by one belligerent on their way to the other. Yet whenever a trade in contraband reaches considerable dimensions, the state whose adversary is supplied by means of it is apt to complain. But it invariably receives in reply a reminder that the practice of nations imposes on neutral governments no obligation to stop such commerce. They are bound to prevent the departure of warlike expeditions from their shores, and the supply of fighting gear to belligerent vessels in their ports. When this is done, the most that can be expected of them in the matter of ordinary business transactions is that they shall warn their subjects of the risks run by carriers of contraband merchandise, and give notice that those who incur them will not be protected by the force or influence of the state. Several important international controversies have been conducted on these lines. Thus, when in 1793 Great Britain complained of the sale of arms and accoutrements to an agent of the French government in the United States, Jefferson, who was the Secretary of State in Washington's cabinet, replied that American citizens "have always been free to make, vend and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means, perhaps, of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement in their occupations. It is satisfied with the external penalty pro-

nounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of the belligerent powers on their way to the ports of their enemies. To this penalty our citizens are warned that they will be abandoned." [1] These words were quoted on behalf of Great Britain when the positions of the two powers were reversed, and the United States, in the case submitted by them to the Geneva Arbitrators in 1872, ranked among their causes of complaint against the British Government its refusal to put a stop to the trade in contraband of war carried on between England and the ports of the Southern Confederacy.[2] On this occasion, as in 1793, the answer of the neutral was deemed conclusive. The British Government did not press its complaint against the administration of Washington, and the Board which arbitrated on the Alabama Claims gave no damages to the United States in respect of the purchase of arms in England by Confederate agents.

The conduct of states in the matter of contraband has been full of inconsistencies. Prussia, for instance, whose merchants conducted an enormous trade in contraband goods across her eastern frontiers during the Crimean War, denounced in vigorous language the conduct of the British authorities in permitting English firms to sell arms and ammunition to France in 1870.[3] The United States Government sent agents to England for the purchase of munitions of all kinds during the first two years of the struggle with the revolted South. France in 1795 complained loudly of the capture by British cruisers of neutral ships laden with supplies of food for her suffering people; but in 1885 she claimed the right to seize and confiscate cargoes of rice carried by neutrals to certain ports of China. It was then the turn of Great Britain to resist the attempt. She gave notice that she would not recognize the validity of any condemnations of her merchantmen engaged in the rice trade, unless they were carrying the

[1] Wharton, *International Law of the United States*, § 391.

[2] *American Case*, part IV; *British Counter Case*, part IV.

[3] British Parliamentary Papers, *Franco-German War, No. 3 (1870)*, pp. 72, 73, 75–77, 97.

grain to Chinese camps or places of naval or military equipment;[1] and fortunately the war came to an end before a case arose. It would be easy to multiply instances. But amid all the contradictions of international recrimination one fact stands out clear and indubitable. No powerful neutral state has ever interfered to stop a trade in arms and ammunition carried on by its subjects with agents of a belligerent government. It is impossible, therefore, to avoid the conclusion that the only legal restraint on such a trade is the liability of contraband to capture, even under a neutral flag. So clear is this that nearly every writer of repute embodies it in his account of the law of contraband. The little band who hold that neutral powers are bound to prohibit the sale of arms and other instruments of warfare within their territory to belligerent agents, base their arguments upon what they deem considerations of justice and equity, which in their judgment override the practice of states.[2] Others, who do not feel at liberty to construct their systems without some reference to the arrangements of international society, but nevertheless desire to place as many restrictions as possible upon trade in contraband, have drawn a distinction between large and small commercial transactions.[3] The latter they regard as a continuation of such ordinary trade as may have existed before the war, whereas the former are called into existence by the war and cannot be considered as in any sense a prolongation of the previous operations of neutral merchants.

If these statements are to be regarded as an expression of existing law, it is sufficient to say that the rule they advocate has never been adopted. If, on the other hand, they are held to set forth what the law ought to be, we may remark that the difficulty of drawing a line between a small trade and a large one is so great as to amount to impossibility. Moreover, it is by no means certain that international trade

[1] Documents Diplomatiques, *Affaires de Chine* (*1885*), pp. 29–32; British Parliamentary Papers, *France, No. 1* (*1885*), pp. 14–21.

[2] Hautefeuille, *Droits des Nations Neutres*, vol. II, tit. VIII, sec. III; Phillimore, *Commentaries*, vol. III, § CCXXX.

[3] *E.g.* Bluntschli, *Droit International Codifié*, §§ 765–766.

in arms on a large scale is confined to times of war. A firm like Krupp of Essen [used to make] artillery for half the armies of the civilized world during periods of profound peace. And lastly, it may be argued that the burden placed by the proposed rule upon neutral governments would be too great for them to bear.[1] The stoppage of large shipments of arms for belligerent purposes from the ports of a great commercial country would require for its effective enforcement an army of spies and informers. And when a state had dislocated its commerce and roused the anger of its trading classes, it might possibly find itself arraigned before an international tribunal and cast in damages because a few cargoes had slipped through the cordon it maintained against its own subjects. The growth of a moral sentiment against making money out of the miseries of warfare may in time check the eagerness of neutral merchants to engage in contraband trade. Meanwhile belligerents must trust to the efficiency of their own measures of police on the high seas to keep cargoes of warlike stores out of the ports of their enemies.

§ 255

Since the law of nations gives to states at war the right of stopping neutral trade in contraband goods by the use of armed force on the high seas, it is obvious that some general agreement as to the articles which come under the description of contraband is necessary in order to avoid constant friction. But even now no agreement exists except with regard to a very small portion of the large field to be covered. Arms and munitions of war were always recognized as being contraband, and there unanimity ended. Grotius divided commodities into three classes: things useful for war only, things useless for warlike purposes, and things useful in war and peace indifferently. The first might always be captured when on their way to an enemy, the second never, and with regard to the third, *res ancipitis usus*, the circumstances of the contest were to be considered.[2]

What articles are contraband of war.

[1] Westlake, Article in *Revue de Droit International et de Legislation comparée*, II, 614–635.

[2] *De Jure Belli ac Pacis*, bk. III, ch. I, 5.

This classification is valuable, and contains, in its reference to surrounding circumstances as the decisive factors in dealing with the third class, the germ of the English doctrine of conditional or occasional contraband. We shall discuss this almost immediately; but meanwhile it will be advisable to show what confusion existed [and indeed still exists] as to the contraband or non-contraband character of goods other than weapons and ammunition. Whichever way we turn we meet nothing but disagreement and inconsistency. Publicist differs from publicist and state from state. Even the same state champions one policy at one time and another at another, and places different lists of contraband goods in different treaties negotiated during the same period. A full account of these diversities is given by Hall,[1] and to it the student is referred if he desires to make himself acquainted with their multitudinous details. As an example of what took place, we may cite the action of Great Britain and the United States with regard to two out of the many classes of disputed goods, naval stores, and horses. The treaty of 1794 between these powers included the former in its list of contraband articles. Yet in the next year the United States expressly excluded them in its treaty with Spain, following thereby its own precedents in the French treaty of 1778, the Dutch treaty of 1782, and the Swedish treaty of 1783.[2] Horses were not included in the list of the treaty with England of 1794; but they are expressly mentioned in the treaty of 1782 with the United Netherlands, though by its twenty-fourth article naval stores were ruled out in the most emphatic terms. The French treaty of 1778 included them. The French treaty of 1800 excluded them. They are mentioned as contraband in the treaty with Sweden of 1783 and the treaty with Spain of 1795. They are not mentioned in the Prussian treaties of 1785 and 1799.[3] During the nineteenth century a list of contraband goods was inserted in many of the treaties of the United States, the general tendency being toward the inclusion of horses

[1] *International Law*, 7th ed., §§ 236–246.

[2] *Treaties of the United States*, pp. 304, 389, 756, 1011, 1045.

[3] *Ibid.*, pp. 303, 389, 756, 903, 911, 1011, 1044.

and the exclusion of naval stores. Great Britain on the other hand preferred to keep herself free from special agreements on the subject. Since the close of the eighteenth century she has entered into stipulations with regard to it very sparingly. But small in number as were her treaty-lists of contraband, they were not consistent with each other. Both horses and naval stores, for instance, were declared to be subject to confiscation in her treaty of 1810 with Portugal, but seventeen years after she agreed with Brazil to omit the former while retaining the latter.[1] [Saddle, draught, and pack animals suitable for use in war were treated by Great Britain as absolute contraband in the great war.][2] In more recent years the chief battles took place over provisions and coals. Russia excluded foodstuffs from her list of contraband published in 1900. With regard to coal she followed France in maintaining the extreme view that it could in no case be regarded as contraband. Yet soon after the outbreak of her war with Japan in 1904 she declared both provisions and fuel to be unconditionally contraband,[3] though afterwards, under strong pressure from Great Britain and the United States, she modified her position with regard to articles of food.

It is clear that no authoritative list of contraband articles can be compiled from diplomatic documents. An examination of the works of publicist leads to a corresponding conclusion. But amid conflicting views it is possible to discern two main tendencies. The first favored a long list of contraband goods and divided them into the two classes of those which are always contraband and those which are contraband or not according to circumstances. It may, as we have already seen, be called English, since its chief defenders are to be found among the jurists and statesmen of Great Britain. The second deemed comparatively few articles to be contraband, but placed them all in the first class, holding that the same thing could not be contraband in one set of conditions

[1] G. F. de Martens, *Nouveau Recueil, Supplement*, vol. VII, p. 211, and vol. XI, pp. 485, 486.

[2] [*Manual of Emergency Legislation, Supplement No. 2 & 3 (1915)*, p. 603.] [3] Lawrence, *War and Neutrality in the Far East*, pp. 159, 166.

and innocent in another. As its chief supporter was France, though she was followed by other continental powers, it may be called French. In this matter, as in several others connected with maritime law, America occupied an intermediate position. In her treaties and her state papers she generally followed European, and especially French, models; while her courts and her legal luminaries as a rule supported English views.

In its more fully developed form the English doctrine divided contraband articles into *goods absolutely contraband* and *goods conditionally contraband*. Among the former it reckoned not only arms of all kinds and the machinery for manufacturing them, ammunition and the materials of which it is made, gun-cotton and clothing for soldiers, but also military and naval stores, including in the latter marine engines and their component parts, such as cylinders, shafts, boilers, and fire-bars. These things were declared to be contraband always and in every case. They were condemned on mere inspection, provided, of course, that they were bound to an enemy destination. They carried their guilt on their face, and were invariably liable to seizure and confiscation. But in addition to these there were other large classes of goods which varied in character. They could not be condemned merely for being what they were. It was necessary to know more about them than their nature and description. All manner of collateral circumstances must be taken into account. Whatever raised a presumption that they would be used for warlike purposes told against them. Whatever tended to show that they would be consumed by peaceful noncombatants told in their favor. It is for this reason that they were called goods conditionally contraband. Among them were provisions, money, coals, horses, and in recent times materials for the construction of railways and telegraphs.[1] It is obvious that the noxious or innocuous character of such things as these depended on the use to which they were applied. Great Britain contended that they might lawfully suffer capture and condemnation when surrounding circumstances

[1] Holland, *Manual of Naval Prize Law*, 1888, p. 20.

make it reasonably clear that they would be used for purposes of warfare. The immediate destination of the goods was held to be the best, though not the only, test of their final use. In the case of the *Jonge Margaretha* (1799),[1] Lord Stowell condemned a cargo of cheeses bound for Brest, a port of naval equipment, the cheeses being such as were used in the French navy. Should the voyage be intended to terminate at the enemy's fleet, or at a place where a portion of his army was encamped, there could be no doubt that condemnation would follow capture. The views thus expressed were spoken of collectively as the doctrine of conditional contraband.

This doctrine was strongly opposed by most of the publicists of the European continent. A modern one, M. Richard Kleen, in a work published in 1893, examined the English decisions and pronounced against their validity.[2] He held nothing to be contraband but objects expressly made for war and fitted for immediate employment in warlike operations. These objects in their completed form, or in parts which can be fitted together without a further process of alteration or manufacture, were liable to capture if found on their journey to an enemy destination.[3] But he added that articles which do not come under these categories can never under any circumstances become lawful prize as contraband of war. He combated with much vigor the views set forth in the *Manual of Naval Prize Law* drawn up in 1888 by Professor Holland for the British Admiralty, and declined to accept proof of the likelihood of hostile use as a sufficient reason for the seizure of goods capable in their own nature of innocent employment. Other continental writers, while questioning the validity of the doctrine of occasional contraband, make admissions which involved its principle. Bluntschli, for instance, declared that such things as engines, horses, and coal might be accounted contraband if it could be shown that they were destined for a warlike use.[4] Heffter ranked them among prohibited goods when their transport to a belligerent

[1] C. Robinson, *Admiralty Reports*, vol. I, pp. 189, 194.
[2] *Contrebande de Guerre*, pp. 30–37.
[3] *Ibid.*, pp. 19–30, 32.
[4] *Droit International Codifié*, § 805.

by a neutral afforded assistance manifestly hostile in its nature.[1] Ortolan maintained that *res ancipitis usus* might be treated as contraband in very exceptional cases; but he excepted from this exception provisions and other objects of first necessity.[2] Klüber admitted the existence of doubtful cases, which must be ruled by surrounding circumstances.[3] As late as 1896 the Institute of International Law first condemned unequivocally the theory of conditional or relative contraband, and then declared that a belligerent might seize on payment of an equitable indemnity "those articles which, being on their way to a port of his adversary, could serve equally for warlike and peaceful purposes."[4]

These opinions conceded all that is essential in the British position. In order to establish the doctrine of conditional contraband it is not necessary to show that every rule of the English prize courts is correct. Harsh decisions may have been given from time to time. The conclusion that the captured goods were really destined for warlike use may have been reached in many cases on the strength of presumptions insufficient to bear the weight of the superstructure reared upon them. All this may be admitted; and yet the fact remains that, by consent so general as to be almost universal, there are circumstances which will justify the seizure and condemnation as contraband of goods which are ordinarily innocent. Provisions are an excellent example. As a rule they are not captured; but if they are stopped on their way to an enemy's force, or a besieged place, they are taken without hesitation or scruple. The vast majority of publicists recognize the legality of such seizure, though some would impose a duty of compensation on the captor state. They thus admit in effect the proposition that what is not contraband at one time and under one set of conditions is contraband at another time and under another set of conditions. When this is allowed, the doctrine of conditional contraband

[1] *Droit International*, § 160.
[2] *Diplomatie de la Mer*, vol. II, p. 179.
[3] *Droit des Gens Moderne de l'Europe*, § 288.
[4] *Annuaire de l'Institut de Droit International, 1896*, p. 231.

is granted, and nothing remains but to settle its application. But it is just at this point that difficulties arose. Great Britain placed many articles *ancipitis usus* in her list of goods absolutely contraband. Naval stores supply a case in point. Masts and spars, boiler-plates and screw-propellers, are needed by peaceful merchantmen as well as by armed cruisers. Yet the Admiralty manual classed them with arms and ammunition, and ordered their capture if bound to a hostile port,[1] a rule which naturally enough found no favor in the eyes of continental publicists.

While such differences as these existed they were a danger to the peace of the civilized world. By the end of the nineteenth century it was felt that polemical discussion could do no further good. In the course of it a possibility of approximation had been revealed. It seemed evident that international agreement might be reached by way of a frank acceptance of the British and American doctrine of conditional contraband, in return for the transfer to the conditionally contraband class of many articles now deemed absolutely contraband by Great Britain. If these mutual concessions were once made, no insuperable difficulty would be presented by the further task of deciding what circumstances connected with the destination of the vessel and the special needs of the enemy should be deemed sufficient to support the presumption that the goods were destined for an essentially warlike use, and were therefore fit subjects of belligerent capture. Thus two lists would come into existence, not at the dictation of belligerents anxious to make the utmost use of their naval power, or neutrals jealous of any interference with a lucrative commerce, but as the result of full discussion carried on with the view of arriving at conclusions just to all. The first list would consist of those things which were contraband in their own nature, and therefore liable to seizure and condemnation if found on their voyage to an enemy destination. The second list would include all other articles capable of military use; but they would not be deemed contraband of war unless it was clear they were about to be employed for warlike pur-

[1] Holland, *Manual of Naval Prize Law*, p. 19.

poses, and were not destined to supply the needs of a peaceful population.

Acting on these views, the Hague Conference of 1907 made a persistent attempt to throw the law of contraband into the form of rules which would command general assent. It succeeded to the extent of drawing up a list of articles absolutely contraband;[1] but it failed to agree on a corresponding list of articles conditionally contraband, and was obliged to give up its task. Its labors were, however, of the greatest service to the Naval Conference of 1908–1909, which adopted without alteration its predecessor's list of absolute contraband, and added to it two others, the first containing goods conditionally contraband and the second goods which might not be declared contraband at all.[2]

The articles absolutely contraband were:

(1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.
(2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.
(3) Powder and explosives specially prepared for use in war.
(4) Gun-mountings, limber boxes, limbers, military waggons, field forges, and their distinctive component parts.
(5) Clothing and equipment of a distinctively military character.
(6) All kinds of harness of a distinctively military character.
(7) Saddle, draught, and pack animals suitable for use in war.
(8) Articles of camp equipment, and their distinctive component parts.
(9) Armor plates.
(10) Warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war.
(11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.

[1] *Deuxième Conférence Internationale de la Paix, Actes et Documents*, vol. III, p. 1114.

[2] *Declaration of London*, Articles 22, 24, 28.

The articles conditionally contraband were:

(1) Foodstuffs.
(2) Forage and grain, suitable for feeding animals.
(3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.
(4) Gold and silver in coin or bullion; paper money.
(5) Vehicles of all kinds available for use in war, and their component parts.
(6) Vessels, craft, and boats of all kinds; floating docks, parts of docks, and their component parts.
(7) Railway material, both fixed and rolling-stock, and material for telegraphs, wireless telegraphs, and telephones.
(8) Balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines.
(9) Fuel; lubricants.
(10) Powder and explosives not specially prepared for use in war.
(11) Barbed wire and implements for fixing and cutting the same.
(12) Horseshoes and shoeing materials.
(13) Harness and saddlery.
(14) Field glasses, telescopes, chronometers, and all kinds of nautical instruments.

The articles which might not be declared contraband at all are:

(1) Raw cotton, wool, silk, jute, flax, hemp, and other war materials of the textile industries, and yarns of the same.
(2) Oil seeds, and nuts; copra.
(3) Rubber, resins, gums, and lacs; hops.
(4) Raw hides and horns, bones and ivory.
(5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.
(6) Metallic ores.
(7) Earths, clays, lime, chalk, stone including marble, bricks, slates, and tiles.

(8) Chinaware and glass.
(9) Paper and paper-making materials.
(10) Soap, paint, and colors, including articles exclusively used in their manufacture, and varnish.
(11) Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.
(12) Agricultural, mining, textile, and printing machinery.
(13) Precious and semi-precious stones, pearls, mother-of-pearl, and coral.
(14) Clocks and watches, other than chronometers.
(15) Fashion and fancy goods.
(16) Feathers of all kinds, hairs, and bristles.
(17) Articles of household furniture and decoration; office furniture and requisites.

[Such were the lists in the Declaration of London; but it was never ratified, and the lists, which were adopted with increasing modifications throughout the earlier stages of the great war, were finally abandoned by Great Britain on April 13, 1916. The government issued an alphabetical string of 169 articles of contraband without any classification of them as absolute or conditional. The notification stated that the circumstances of the war were so peculiar that for practical purposes the distinction had ceased to be material. "So large a proportion of the inhabitants of the enemy country are taking part, directly or indirectly, in the war that no real distinction can now be drawn between the armed forces and the civilian population. Similarly, the enemy government has taken control, by a series of decrees and orders, of practically all the articles in the list of conditional contraband, so that they are now available for Government use. So long as these exceptional conditions continue our belligerent rights with respect to the two kinds of contraband are the same, and our treatment of them must be identical."[1] A Proclamation of July 2, 1917, restored the distinction between absolute and conditional contraband, but nearly 200 species of goods were included in the former, and a little less than 40 in the

[1] [*British and Foreign State Papers* (1916), vol. cx, pp. 181–186.]

latter.[1] When we note that things as seemingly remote from fighting as waxes of all kinds were in the list of absolute contraband, while lichens and mosses were put under conditional contraband, and that the majority of goods reckoned as entirely non-contraband in the Declaration of London were made absolute contraband, we get some idea of the enormous extent of articles useful in modern warfare and of the very limited conception of it formed in that Declaration. Of Great Britain's allies, Russia until she retired from the war retained the distinction between absolute and conditional contraband, considerably enlarging the former. Italy, in March, 1917, recognized the abandonment of the distinction. Serbia and Portugal did the same, increasing their lists to nearly 80 articles. France never formally threw it over, but little practical interest in it remained after the Allied Powers decided to seize and take into port ships carrying goods of any kind destined for Germany.[2] Germany herself was not allowed much opportunity of applying such theory of contraband as she had, for after a time her surface warships remained in port and therefore made no captures. The cargoes of such neutral ships as they sank or brought into port had not much chance of escaping condemnation, for most of the ports of the United Kingdom were treated as fortified places or bases of operations. The Dutch ship, *Maria*, with a cargo of wheat, which the claimants alleged was intended for the use of private mills in Ireland, was sunk in 1914 by a German cruiser. We need not here consider the legality of the sinking which was disputed. But the theory of the German Prize Court was that the cargo was subject to condemnation because the claimants could not give an undertaking that the wheat would not ultimately be taken by the British government for military or naval forces. Similarly, in the case of another Dutch vessel, *The Medea*, which was sunk in 1915 with a cargo of oranges destined for private individuals in London, it was held sufficient ground for condemnation by the German Prize court that London was an enemy fortified port; and the court re-

[1] [*British and Foreign State Papers* (1917–1918), vol. CXI, pp. 37–43.]

[2] [Fauchille, *Droit International Public*, vol. II, §§ $1588^{22}$–$1588^{24}$.]

garded itself as having evidence that oranges were provisions supplied by the British government to its troops. Occasionally, however, the court took a more lenient view, compensation being allowed for the seizure of timber carried in a Swedish vessel, the *Elida*, and consigned to a British firm in Hull. The timber had been brought in for condemnation owing to the captor's mistaken belief that it was fuel.[1]]

§ 256

Alterations and conditions, including destination.

The lists given in the last section were to be brought into operation among the states which accepted the Declaration of London by the mere fact of war, without any publication on the part of the belligerents. But any signatory power was at liberty to declare that it would add to the list of absolute contraband an article or articles exclusively used for war, or to the list of conditional contraband an article or articles susceptible of use in war as well as for the purposes of peace. All declarations of change, whether made in time of peace, or at the beginning of a war or during its continuance, as would usually be the case, were to be notified to other powers, in order to give them an opportunity of raising objections if they wished and publishing the information for the benefit of their merchants and shippers.[2] The whole system was an attempt to find means of revising the lists as the progress of invention arms mankind with new weapons and renders old ones obsolete. [The attempt unfortunately failed, not merely because the Declaration was unratified, but because it did not grasp the far-flung range of modern warfare, which in a great struggle means the mobilization of nearly every adult either for fighting or for purposes more or less directly connected with fighting. Once concede this, and it is not very easy to imagine many articles that are not useful for warfare in some way or other. The swollen list of contraband is to be estimated not merely by the march of invention but also by the organization of the whole nation for belligerent ends.

[1] [Garner, *International Law and the World War*, vol. II, §§ 486, 487, 508.]

[2] *Declaration of London*, Articles 23, 25, 26.

Nor is the progress of scientific discovery always an infallible test of the supersession of one weapon by the discovery of another. The author pointed out that a few years ago balloons were scientific toys, that flying machines did not exist, and that both are now part of the equipment of every well-supplied army. But he went on to add that no one would dream of putting bucklers and coats of mail, which were included as contraband in the treaty of 1778 between France and the United States,[1] in a similar treaty to-day. Yet not only were steel helmets universally worn during the great war, but body armour of a kind was not unknown,[2] and both were certainly contraband.]

[The Declaration of London specially mentioned two kinds of articles which, quite apart from the articles in its third list, were not to be treated as contraband; and this prohibition seems to have been respected during the great war.] They are "articles serving exclusively to aid the sick and wounded," and "articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage." The first are exempt from capture on grounds of humanity; but in the case of urgent military necessity they may be requisitioned subject to payment of compensation, if they are on their way to an enemy destination. The second are exempt on grounds of convenience. It would not be right to deprive a vessel of the means of signalling or defending herself against pirates, nor would any warlike purposes be served by taking away from her crew and passengers overcoats and telescopes they had brought for use on the voyage.[3]

The contents of an arsenal found on their way to neutral magazines would no more be contraband than cargoes of Paris fashions or children's toys. In order that goods of a nature to be useful for warlike purposes may be captured it

[1] [Treaties of the United States, p. 303.]

[2] [A brother officer of the editor's on the Western front had a species of breast-plate as a protection against spent bullets. He did not use it in action for the same reason that made the English soldier unwilling to use the steel helmet when it was first introduced.]

[3] *Declaration of London*, Article 29.

is necessary that they should have an enemy destination. [We will state the rules of the unratified Declaration of London as to this, and then note variant practices during the great war.] In the case of absolute contraband any kind of enemy destination is sufficient. It may be the territory of a hostile power, or territory under its military occupation for the time being, or it may be its armed forces on land and sea. Proof of such destination is held to be complete, both when the ship's papers show that the goods are to be discharged in an enemy's port, or delivered to his armies or warships, and when the goods are documented for a neutral port, but the vessel is to call at enemy ports only, or to touch at an enemy port, or meet the armed forces of the enemy before reaching the neutral port. Her papers are conclusive proof of her destination, unless it is clear from her position and other indications that their statements are not to be trusted.[1]

In the case of conditional contraband any kind of enemy destination is not sufficient. It must be the armed forces of the enemy state, or one of its government departments, unless in the latter case it is clear that the goods cannot be used for the purposes of the war in progress. Reasonable certainty of this will relieve all the goods in the second list from liability to capture except those mentioned under its fourth head, which are in effect money or bullion. The required destination is presumed to exist, if the goods, being themselves in the list of conditional contraband, are consigned to a fortified place held by the enemy, or to one of his bases of operations, or to enemy authorities, or to contractors established in an enemy country who, as a matter of common knowledge, supply the enemy government with articles of the kind in question. A mere destination to enemy territory is not enough. The spot has to be connected with the war in some particular way. And if the article whose contraband character is sought to be proved is a merchant vessel, destination to a fortified place or a naval base will not give rise to a presumption against her, but destination for the use of the armed forces or government departments of the enemy must be

[1] *Declaration of London*, Articles 30–32.

directly proved. A presumption of innocence arises when none of the above grounds for presuming guilt is shown to exist, but either presumption may be rebutted by evidence to the contrary. There is no presumption conclusive and incapable of rebuttal, as in the case of absolute contraband. When a ship is found to be carrying conditional contraband, her papers are conclusive proof "both as to the voyage in which she is engaged, and as to the port of discharge of the goods," unless she is found clearly out of the course indicated by them, and is unable to give satisfactory reasons for the deviation. Thus the testimony of the papers completes the chain of evidence. The use to which the goods are to be put fixes their guilt or innocence; the destination is proof of the use, and the papers are proof of the destination.[1]

Whether a vessel is carrying absolute or conditional contraband, she "may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination." But she is free from liability to capture on the return voyage, provided it is innocent. When the unlawful carriage of contraband goods comes to an end, the offence comes to an end also.[2]

[The provisions of the Declaration of London as to destination were adopted at the outbreak of the great war by Great Britain and her allies with sporadic amendments which became increasingly severe. Thus, an Order in Council of October 29, 1914, provided that (i) A neutral ship which, in spite of a neutral destination shown on her papers, proceeded to an enemy port, was capturable if she were encountered before the end of her next voyage. (ii) The destination of conditional contraband must be presumed to be hostile if the goods were consigned to an agent of the enemy state. (iii) Such contraband was also liable to capture if the goods were consigned to order, or if the ship's papers did not show who the consignee was. (iv) The burden of proving innocence in (iii) should be on the owners of the goods.[3] On March 30, 1916,

[1] *Declaration of London*, Articles 33–35. [2] *Ibid.*, Articles 37, 38.

[3] [*Manual of Emergency Legislation* (1914–1915). *Supplements No. 2 and 3*, p. 79.]

(ii) and (iii) above were applied to absolute contraband, which was further presumed to have a hostile destination if the consignee had previously forwarded imported contraband goods to territory belonging to, or occupied by, the enemy; and it lay upon the owner to rebut these presumptions by proving the innocent destination of the goods.[1] The general drift of these rules is plain. The Allied Powers were finding the greatest difficulty in stopping goods which were being passed to Germany through the neutral countries on her borders. Every sort of device, honest or dishonest, was resorted to by neutral shippers (some of them were disguised enemy agents) in order to evade the rules as to hostile destination. It was to checkmate them that the Articles of the Declaration of London were varied. The amendments were only partially successful in attaining their object, and the Declaration was therefore abandoned on July 7, 1916. The reasons for this cannot be better stated than by quoting the British memorandum of that date issued to neutral powers. "As events progressed," it ran, "the Germanic Powers put forth all their ingenuity to relax the pressure tightening about them and to reopen a channel for supplies; their devices compromised innocent neutral commerce and involved it in suspicions of enemy agency. Moreover, the manifold developments of naval and military science, the invention of new engines of war, the concentration by the Germanic Powers of the whole body of their resources on military ends, produced conditions altogether different from those prevailing in previous naval wars." The Allies' conclusion was that "they must confine themselves simply to applying the historic and admitted rules of the law of nations." This looked like a decent burial of the Declaration which had taken a long time in dying, but the same memorandum, if it did not revive the corpse, nevertheless resuscitated a good deal of the spirit that had animated it. For it contained a solemn declaration that the warships and Prize Courts of the allies would continue to conform to faithful observance of their engagements under international conventions relating to the laws of war; that

[1] [*British and Foreign State Papers* (1916), vol. cx, pp. 173–174.]

they repudiated all thought of threatening the lives of non-combatants; that they would not without cause interfere with neutral property; and that if their fleets caused damage to the interests of any merchant acting in good faith, they would always be ready to consider his claims and to grant him such redress as might be due.[1]]

§ 257

The doctrine of continuous voyages.

The [unratified] Declaration of London laid down with regard to absolute contraband that if it is shown to be destined to enemy territory or enemy armed forces "it is immaterial whether the carriage of the goods is direct, or entails transshipment or a subsequent transport by land."[2] With regard to conditional contraband the Declaration provides that it shall be free from capture "except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged at an intervening neutral port."[3] In the first case the destination of the goods is made the controlling factor, and in the second the destination of the vessel. But to the latter an exception was made when "the enemy country has no seaboard." Then conditional contraband can be captured, in spite of the neutral destination of the vessel which carries it, if it is shown to be on its way to the armed forces or government departments of the enemy state.[4] These three passages, taken together, were intended to be a great compromise of a great controversy. [But as the Allied Powers practically abandoned the Declaration during the great war] we must give a brief historical account of it, [and append to it some reference to occurrences during that war].

In 1793 Great Britain rightly or wrongly forbade neutrals to trade between the colonial and home ports of her enemies, when such commerce was thrown open to them as a war

[1] [*British and Foreign State Papers* (1916) vol. cx, pp. 238–240. Among other decisions of the British Prize Courts, see *The Kronprinzessin Victoria.* L. R. [1919] A. C. 261. *The Urna.* L. R. [1920] A. C. 899.]

[2] See Article 30. [3] See Article 35. [4] See Article 36.

measure after having been closed in time of peace. American vessels entered the French and Spanish colonial trade, and endeavored to evade the British prohibition by putting into a port of the United States *en route*, and then carrying their cargoes on to the forbidden destination. Some of these ships were captured, and the capture generally took place on the second stage of their journey. Sir William Scott laid down that the two voyages made in law but one voyage, and condemned the vessel even when the goods had been passed through the customs house in the American port.[1] This was called the doctrine of continuous voyages. It survived the temporary emergency that gave it birth, because of its obvious applicability to other and more enduring situations. About the middle of the nineteenth century it began to be applied to contraband, and in a few cases connected with the American civil war to blockade. And in the course of its application to new circumstances almost imperceptibly a change came over the doctrine itself. In its second form it dealt with goods rather than ships, and asserted that when the cargo was to be carried on, as part of the same commercial transaction, from a neutral destination perfectly innocent in itself to an enemy's storehouses or a blockaded port, then it was liable to capture on the first stage of its journey as well as the second, irrespective of the fact that the second stage was to be performed in a different ship or by land carriage. Outside the United States the transformed doctrine found little favor in its application to blockade, and we saw in the previous chapter that the [unratified] Declaration of London banished it from the law relating to that operation. But a large body of opinion favored its use in cases of contraband, and in 1896 the Institute of International Law introduced it under carefully worded conditions into a set of rules on the subject.[2] It was applied by several prize courts, and found a place in the naval regulations and manuals of various nations, notably in those issued by Russia and Japan for the

[1] Baty, *International Law in South Africa*, pp. 4–10, 15–23. For a review of cases by the judge, see *The Maria* (1805), C. Robinson, *Admiralty Reports*, vol. v, p. 365.

[2] *Annuaire*, 1896, p. 231.

war of 1904–1905. But in the case of the *Bundesrath*[1] Germany strongly opposed it, and contended that the neutral destination of the vessel was conclusive in her favor, since there could be no question of contraband in a trade between neutral ports. In the Hague Conference of 1907 she maintained her position, not without support in other quarters, while Great Britain's drastic proposition to get rid of difficulties by abolishing the law of contraband was not backed by voting power strong enough to carry it,[2] and has since been dropped altogether. At last in 1909 the Naval Conference of London tried to settle the question by a compromise. The doctrine was not to apply to conditional contraband except in the extraordinary case, which can occur very seldom, of a belligerent which has no coast-line. Obviously it would be unfair to allow it to make a neutral port more useful to it in its war than a port of its own could be. A belligerent port can be closed by blockade, but a neutral port cannot. Warlike supplies could be sent to it with absolute impunity in neutral vessels, and could then be forwarded in safety by land carriage to the camps and arsenals of the coastless belligerent. The only way to prevent this is to allow a maritime enemy to intercept the warlike stores at sea, and this is what the Declaration of London would have done, with due precautions for proof of the hostile destination of the goods before they can be condemned. On the other hand, in cases of absolute contraband the final destination of the goods was to be the decisive element. It would be absurd to suppose that a powerful fleet would rock idly on the waves off a great neutral port, while cargo after cargo of arms and munitions of war were poured in under its eyes, and taken from the quays by a short railway journey to the arsenals of a foe whose navy it had swept from the seas, and whose ports it was keeping under strict blockade. Justice demands that no such perversion of neutrality should be allowed. Humanity cries out against the prolongation of the war which would certainly result from it. And prudence deprecates the putting of such a strain on

[1] See § 186.

[2] Lawrence, *International Problem and Hague Conferences*, pp. 186–189.

human nature as would be involved in the attempt to enforce it. [The limitations put upon the doctrine of continuous voyages by the Declaration of London steadily crumbled away during the great war. There is no need to repeat here the successive measures of the Allied Powers, who applied the doctrine first to conditional contraband if the goods were consigned "to order" or to an enemy state agent, or if the consignee's name did not appear; and then to absolute contraband in circumstances far beyond the ken of the Declaration of London.[1] Then followed the Maritime Rights Order in Council, which on July 7th, 1916, set aside the Declaration of London and applied "the principle of continuous voyages or ultimate destination" to both contraband and blockade. Ten months earlier, the British Prize Court had shown in *The Kim* that judicial opinion was setting in the same current as executive orders were. *The Kim* was one of a number of neutral ships carrying over 73 million pounds weight of foodstuffs, rubber, and hides from New York to the neutral port of Copenhagen. These vessels were captured by British forces and taken in for adjudication. There was no doubt that the ultimate destination of their cargoes was Germany, although the nominal one was Copenhagen; for the immense quantity of goods, which Denmark had been importing since the outbreak of hostilities compared with her pre-war trade, was suspicious in itself. The court held that in applying the doctrine of continuous voyages, regard must be had to the circumstances of the time, including the circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it; that it was entitled to ascertain whether the neutral destination were merely ostensible, and if so what the real ultimate destination was; and that the cargoes of these vessels (except portions acquired by persons in Scandinavia) must be condemned. This decision was upheld by the Judicial Committee of the Privy Council.[2] It has been both praised and criticised. The complaints of the owners of the condemned goods ceased on payment of compensation to them by the British govern-

[1] [See § 256.]

[2] [L. R. [1915] P. 215. 116 Law Times Reports, 577.]

ment.[1] According to later decisions of the Prize Court, it was immaterial that the imported goods were to be retained in the neutral country only long enough to enable them to be manufactured into goods destined for the enemy, *e.g.*, leather to be made into boots;[2] or that the goods were to be sent by the neutral consignees into the enemy country where their form was to be changed and they were to be returned to the consignees, e.g., wool to be combed and redelivered.[3] On the other hand, it did not follow that raw material on its way to citizens of a neutral country to be there manufactured into an article for consumption in that country was subject to condemnation merely because the consequences were that another article of the like kind would be exported to the enemy by other citizens of the neutral country. Thus a cargo of cocoa-nut oil destined for margarine manufacturers in Sweden was released; for it was not shown that the oil was imported for the manufacture of margarine to be sent to the enemy, nor that the margarine manufacturers were acting in combination with butter producers with the intention of producing margarine, in order that the Swedes might consume that and export butter to Germany.[4]]

§ 258

The essentials of guilt in the matter of contraband.

There is such a vast amount of loose thinking and writing on the subject of contraband that it will be advisable to set forth here in close juxtaposition the essentials which must coexist before an offence is committed, though they have all been mentioned incidentally in the former part of this chapter. We must note in the first place that it is transport, and not bargain and sale, which the law of contraband aims at. Neutral traders are free to sell arms and other contraband goods within the neutral territory to agents of the warring powers. It is only when they export such articles to one belligerent that the right of capture is acquired by his enemy. In other words

[1] [Garner, *International Law and the World War*, vol. II, § 506.]
[2] [*The Balto.* L. R. [1917] P. 79.]
[3] [*The Axel Johnson*, L. R. [1921] 1 A. C. 473.]
[4] [*The Bonna.* L. R. [1918] P. 123.]

the *commerce passif* of recent continental writers is allowed, but the *commerce actif* is left to the mercy of the belligerent who suffers from it. This is an old and well-established rule. Bynkershoek lays it down in the terse sentence, *Non recte vehamus, sine fraude tamen vendimus.*[1] It is the doctrine of the prize courts of all civilized peoples, and has never been controverted except by those theorists who would lay on neutral states the unendurable burden of preventing all traffic in munitions of war between their subjects and the belligerent powers.

Secondly, a belligerent destination is essential. This is implied in rule after rule of the Declaration of London, and was stated with the utmost clearness in the Report of the Drafting Committee,[2] which was drawn up by M. Renault, the distinguished French jurist who represented his country at the Naval Conference. A century ago it was so fixed and settled a principle that a British court released a neutral Danish vessel, captured at Cape Town in 1806, on the ground that Great Britain was in possession of the place when she arrived, and therefore "long before the time of seizure these goods (*i.e.* her cargo) had lost their noxious character of going as contraband to an enemy's port."[3] A few years later a hostile fleet lying in a neutral port was adjudged by an American decision to be a belligerent destination. Sweden was neutral in the war of 1812–1814 between Great Britain and the United States, and the *Commercen*,[4] a Swedish vessel, was engaged in a voyage from Cork to the neutral Spanish port of Bilbao. But she carried a cargo of grain, and it was shown that her captain meant to deliver it to a British fleet lying in the harbor. The vessel was captured before she reached her destination by an American privateer, and the case came finally before the Supreme Court, which condemned the cargo on the ground of hostile destination. The princi-

[1] *Quaestiones Juris Publici*, bk. I, ch. 22.

[2] British Parliamentary Papers, *Miscellaneous*, No. 4 (1909), p. 43.

[3] *The Trende Sostre*, C. Robinson, *Admiralty Reports*, vol. VI, pp. 390–392, note.

[4] Wheaton, *Reports of the Supreme Court*, vol. I, p. 382; Scott, *Cases on International Law*, p. 765.

ple holds good when there is no question of a port of any kind. To supply the fleets or single cruisers of a belligerent with munitions of war on the open sea would be as clear a case of contraband as carrying a consignment of shells to a naval arsenal. [The varying rules adopted during the great war have been noticed.[1]]

Thirdly and lastly, the offence is complete the moment a neutral vessel laden with contraband leaves neutral waters for a belligerent destination, and is "deposited" the moment the destination is reached and the goods delivered thereat, and not dumped down elsewhere as a blind.[2] As Lord Stowell said, in the case of the *Imina*,[3] "The articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port." The offence generally exists from the beginning to the end of the outward voyage, and ceases to exist the moment the contraband goods are placed in the hands of the enemy. [The practice of the Allied Powers during the great war was more severe.[4]] But if during the voyage the guilty destination has been changed for an innocent one, as happened in the case of the *Imina* cited above, or if a hostile destination becomes friendly through surrender or cession, then a capture made after the change has been effected will not result in condemnation. [But, according to British practice, if the capture be made during an armistice, the vessel will be condemned, for an armistice is quite consistent with a possible renewal of hostilities, and therefore the destination does not cease to be hostile.[5]]

## § 259

There has been great divergence of opinion between maritime powers as to the penalty for carrying contraband of war. They are agreed that the contraband goods should be confiscated, though even on this point there has been at least one

[1] [See §§ 256, 257.]

[2] See the case of the *Yiksang*, given in Takahashi, *International Law during the Chino-Japanese War*, pp. 73–107.

[3] C. Robinson, *Admiralty Reports*, vol. III, p. 168.

[4] [See § 256.]

[5] [*The Rannveig*, L. R. [1922] A. C. 97.]

treaty which provided for temporary sequestration only.[1] There is also a general agreement that in certain circumstances the ship may be condemned as well as the goods. But few states hold the same opinions as to what those circumstances are. Some powers, such as Great Britain, the United States, and Japan, have looked chiefly to ownership, and condemned the vessel when she belonged to the proprietor of the noxious goods. Others, like France, Germany, and Russia, have laid most stress on the proportion between the noxious goods and the rest of the cargo.[2] Other tests, or combinations of tests, were sometimes used. The [unratified] Declaration of London [attempted to] deliver the civilized world from a diversity which was as dangerous as it was confusing. It rendered liable to confiscation not only contraband goods, but the vessel which carries them also, "if the contraband reckoned by value, weight, volume, or freight, forms more than half the cargo." It added, as a penalty for carrying a less proportion, that, in case the goods are condemned and the vessel released, "she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national prize court and the custody of the ship and cargo during the proceedings." And further it renders the owner of contraband goods liable to the loss of his innocent goods found on board the same vessel.[3] [This rule was applied by the English Prize court in connection with the great war as a long established one existing quite independently of the Declaration of London, and unaffected by the Declaration of Paris, 1856.[4]] If less than half of a vessel's cargo is contraband, and therefore she herself is not liable to condemnation, her master may, when circumstances permit and the captor is willing, hand over the contraband to the belligerent warship. Along with it must be

The penalty for carrying contraband.

[1] The treaty of 1795 between the United States and Prussia which expired in 1796. See *Treaties of the United States*, p. 903.

[2] British Parliamentary Papers, *Miscellaneous*, No. 5 (1909), pp. 70–73.

[3] *Declaration of London*, Articles 39–42.

[4] [*The Kronprinsessan Margareta*, L. R. [1921] 1 A. C. 486.]

given certified copies of all relevant papers, which the captor must send in for adjudication, while he may destroy the contraband goods at sea. But the owners must be compensated in the event of a decision of the prize court against the validity of the capture;[1] [but not, according to British practice, if there were reasonable suspicion for the seizure.[2] During the great war, the British Prize Court also held, in applying British rules independently of the Declaration of London, that the shipowner's knowledge of the confiscable character of the goods will justify condemnation of the ship, at any rate where the goods are a substantial part of the cargo; and that his knowledge of the destination may be inferred if he refrained from making inquiries on facts that would create a suspicion in the mind of a reasonable person.[3]] In such extremities as would have justified the destruction of the vessel had she been liable to condemnation,[4] the captor may demand as a matter of right the handing over of the contraband goods for destruction.[5]

In three cases compensation must be given, though the goods are lawfully seized. The first occurs when a vessel is encountered at sea, her master being unaware of the outbreak of war or the declaration on the part of a belligerent that he will regard as contraband certain articles which form part of her cargo, the second when the master has become aware of the outbreak or notification, but has had no opportunity of discharging the contraband,[6] and the third, which we have already mentioned,[7] when medical stores and comforts are seized under stress of urgent necessity.[8] To these comparatively small dimensions [was it intended to reduce] reduce the right of compensation for capture of condi-

[1] [*Declaration of London*, Articles 44, 64.]
[2] [*The Falk*. L. R. [1921] 1 A. C. 787.]
[3] [*The Hakan*. L. R. [1918] A. C. 148. *The Hillerød*, *Ibid.* 412.]
[4] See § 191.
[5] *Declaration of London* Article 54.
[6] *Ibid.*, Article 43.
[7] See § 255.
[8] *Declaration of London*, Article 29.

tional contraband claimed by many continental jurists. But there was nothing in the Declaration to prevent any state from giving such compensation if it pleases, just as Great Britain used to apply preemption to conditional contraband and such absolute contraband as was unmanufactured and the produce of the country in whose vessel it was found.[1] A shipmaster cannot plead ignorance of a war or a declaration of contraband, if he left an enemy port after the declaration of hostilities, or a neutral port after the arrival of the notification of hostilities or the declaration of contraband.[2] [According to British practice, however, a neutral shipowner can in wholly exceptional cases be allowed freight. This is within the discretion of the court, and it will not be granted to the shipowner merely because he was ignorant of the enemy destination of the contraband goods, nor because, in addition to that, he had informed the British authorities of the proposed shipment.[3]] [4]

[This chapter cannot well be closed without an attempt to deduce some results from the occurrences of the great war. That the law of contraband as it appeared on paper in 1914 was adequate to modern warfare nobody can reasonably maintain. That the state of confusion in which it was left in 1918 can be permanent is highly improbable. The problem remains at root what it has been ever since neutrality has been a distinct branch of International Law, and that is to find a practical compromise between two opposing views, the belligerent's and the neutral's. The aim of the belligerent is to reduce his

[1] Holland, *Manual of Naval Prize Law*, p. 24.

[2] *Declaration of London*, Article 43. The text of the Declaration and the Report of the Drafting Committee can be found in Higgins, *The Hague Peace Conferences*, pp. 540–613, and Whittuck, *International Documents, Appendix*, pp. 256–322. The text alone is given in *The Supplement to the American Journal of International Law*, vol. III, pp. 190–220.

[3] [*The Prins der Nederlanden*. L. R. [1921] 1 A. C. 754.]

[4] [On the topic of contraband generally, see Oppenheim, *International Law*, vol. II, §§ 391–406*a*. Hall, *International Law*, 7th ed., §§ 236–247*a*. Garner, *International Law and the World War*, vol. II, ch. XXXII. Fauchille, *Droit International Public*, vol. II, §§ 1535–1588[49]. Pyke, *Law of Contraband of War* (1915). Erle Richards in *British Year Book of International Law* (1920–1921) pp. 11–34. *Ibid.* (1922–1923), pp. 1–16.]

enemy by severing the arteries of commerce which supply not only the fighting forces but the civil population of the latter; for it is clear that, after the experience of the great war, food supplies, to mention no others, will be stopped wherever possible, no matter whether it is the civilian or the soldier who is intended to consume them. On the other hand, no neutral state can be expected to submit to the stoppage of the whole trade of its citizens with those of other neutral states or of the other belligerent. Some middle course which will reconcile these views may be difficult to find, but the task is not impossible. A great effort was made to accomplish it by the Declaration of London, and it would be a mistake to regard the Declaration as a total failure. It was really one of the series of steps that every body of law must take before its journey to scientific perfection is completed. A plan that might be feasible (though it is suggested with considerable diffidence) is one that would require the coöperation of the neutral state to whose territory the presumptively contraband goods are exported, when that territory adjoins that of the enemy state. If associations in the neutral country could be formed, which would guarantee the belligerent that goods shipped to them should not be forwarded in their original or manufactured shape to the other enemy's territory, then these goods might be allowed to go free. This, as we have seen, was actually one of the devices adopted in connection with the British blockade of Germany after the Declaration of London had been abandoned.[1] A grave defect in it was that it depended entirely on the good faith of the associations of merchants to whom the goods were sent; if they broke their promise, or even took a perfunctory view of its performance, the goods would reach the enemy territory in sufficient quantities to make the arrangement useless. It is here perhaps that the neutral state itself might step in. If the associations were connected with their state in such a way as to make any wilful or negligent evasion of their guarantee criminally punishable, this might make them of more practical value. It may be forcibly objected to this that it is, in a special class of cases, compelling

[1] [See §252.]

the neutral state in question to forbid its subjects to export contraband; that modern International Law has never gone the length of this; that, if it did, it would be laying on neutrals a burden too great to be borne; and, worst of all, that it would be acting unfairly to neutrals in compelling a neutral state whose territory happens to be contiguous to that of an enemy state to prevent exportation of contraband, while allowing one whose territory is not so adjacent to let its subjects trade at their own risk. The weight of these arguments is undeniable. Yet it must be a serious question for the next conference of powers which must sooner or later meet to deal with this and other problems, whether the course suggested, or some variation of it, would not be preferable to the unreal position which the Declaration of London supposed to exist and to the impossible position in which neutrals found themselves at the end of the great war.]

# CHAPTER VII

## UNNEUTRAL SERVICE

### § 260

THERE are acts sometimes performed by neutrals which involve an entry for the time being into the service of a belligerent, and the doing for him what is of direct advantage to him in his war. They are not mere commercial ventures, like carrying contraband goods to a neutral market, and therefore the law of contraband does not apply to them. Its *formulae* deal with ships and destinations, goods and cargoes. They cannot be made to apply to such acts as the transport of noxious persons and the transmission of warlike intelligence, which are two of the chief of the forbidden services. Such acts differ from offences against the law of contraband in three ways.

The nature and name of the offence.

First, there is a difference in the character of the acts themselves. What takes place in cases of contraband is done purely as a matter of trade. Its subjects are commodities and its object gain. In unneutral service the acts are not acts of ordinary commerce. Their predominant attributes are warlike rather than mercantile. It is true that they are generally done for reward; but they involve entering for a time into the service of a belligerent, and doing for him something so helpful in his war that neutrals ought not to do it. What Sir William Scott said in the case of the *Atalanta*[1] of carrying warlike despatches applies equally well to all other forms of the offence we are considering. He who does such things "under the privilege of an ostensibly neutral character does in fact place himself in the service of the enemy state, and is justly to be considered in that character."

Secondly, there is a difference in the proof required. Contraband merchandise must be taken on its way to an enemy

[1] C. Robinson, *Admiralty Reports*, vol. VI, pp. 440, 455.

destination in order that its confiscation may be legal. But destination is immaterial in cases of unneutral service. Indeed, in some cases, such as transmitting signals or buoying a passage for a belligerent fleet, there cannot be said to be a destination at all. It is the nature of the mission which is the important matter. The point from which the vessel starts and the point at which it arrives may both be neutral ports, and yet she may have done something during the passage between them to subject her to severe penalites. Let us suppose she has laid mines for one belligerent. If the other captures her, we may be sure she will receive the utmost punishment allowed by International Law. Again, in order to secure the release of the vessel in a case of contraband, it is [apart from abnormal practices during the great war] enough to show that she has delivered the noxious cargo. But this would not suffice in many cases of unneutral service. For instance, a neutral transport would be liable to condemnation as long as she remained in the service of the enemy, even though the troops she carried had been disembarked and she was captured in ballast on the return voyage.

Thirdly, there is a difference in the penalty enforced. In cases of contraband it is the confiscation of the noxious cargo, and that of the vessel also in aggravated cases. In cases of unneutral service it is the confiscation of the vessel along with any unlawful things she may be carrying, but not that of the cargo except in aggravated cases.

We can now see that an attempt to discuss the kind of acts we have been considering as if they came under the law of contraband must lead to nothing but confusion. Hall distinguished between carrying contraband and performing services for a belligerent, but calls the latter "analogues of contraband," though he confesses that the analogy is "always remote." [1] Oppenheim prefers Hall's phrase, while declaring that he uses the term unneutral service because it has been officially adopted.[2] Holland uses the expression Enemy Service,[3] which describes the transgressions referred to

[1] *International Law*, 7th ed., § 248. [2] *Ibid.*, vol. II, § 407.
[3] *Neutral Duties in a Maritime War*, pp. 12, 14.

from the point of view of one of the belligerents only. The same may be said of *Assistance Hostile*, which is the heading of Chapter III of the official French text of the Declaration of London. The English translation uses the phrase Unneutral Service, and it seems a satisfactory name, though Oppenheim calls it "misleading" without giving reasons for his unfavorable opinion.[1] As a description it is accurate. It points to the most prominent characteristic of the offences described; and it has the merit of avoiding any reference to contraband. It thus emphasizes the fact that it deals with acts which require special rules of their own, and do not need to come as interlopers within the ambit of the law applicable to something else through the back door of a remote analogy. This view of the question has since received the sanction of the Naval Conference of 1908–1909, which devoted a separate chapter to Unneutral Service in the Declaration of London.

The [unratified] Declaration of London tried to give the world for the first time a coherent law of unneutral service. There is general agreement that some measure of punishment is necessary in order to deter neutral individuals from the performance of acts which are distinctly unneutral in their character, and yet not of a kind which their governments are bound to prevent. Some are trivial; but some fall little short of actual participation in the war without open enrolment in a belligerent fighting force. Moreover, the conditions of modern warfare are causing a rapid increase in the numbers of such acts, especially as regards naval matters.[2] No fleet can now keep the seas without a long train of auxiliary vessels; and neutrals are often engaged in supplying fuel, executing repairs, laying cables, and many other matters most of which were unknown half a century ago. In the old days unneutral service was largely concerned with the carriage of despatches in ships, which can hardly be regarded as a source of liability since the Hague Conference of 1907 exempted

[1] *International Law*, vol. II, § 407.

[2] Speech of Mr. [now Sir] Eyre Crowe at the Fourth Session of the Naval Conference; see British Parliamentary Papers, *Miscellaneous*, No. 5 (1909), p. 166.

mail-bags from belligerent search.[1] The transport of persons in the warlike service of the enemy was another great head of offence. It still remains, but is largely modified by the constant obligation of military service, the frequency and ease of emigration, and the existence of an enormous passenger traffic carried on by great ocean liners. The old cases were few in number, and the rules laid down in them, besides being by no means exhaustive, did not respond to modern needs. It was necessary to evolve, from them and from the equities of the case, a chapter of law applicable to present conditions, and so expressed that it could cover the new points that may be expected to arise with startling frequency. This task the Naval Conference of 1908–1909 endeavored to perform. It began by making a distinction between the less serious and the more serious cases, and then worked out a set of rules for each in the manner about to be described. [During the great war these rules were at first adopted, though the Declaration of London which embodied them had not been ratified. But we have seen that the Declaration itself was abandoned by the Allied Powers on July 7, 1916,[2] and recourse was had to such rules as existed independently of it. The following sections must therefore be read subject to the qualification that present practice is not necessarily represented by the rules of the Declaration.]

§ 261

The lesser offences of unneutral service.

The [unratified] Declaration of London deals first with unneutral services in which the gravity of the offence is not deemed to be more than moderate. They render the vessel and any goods on board her belonging to her owner liable to confiscation, and place her in the position of a neutral ship seized when carrying contraband. This effect arises, first, if the vessel "is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy"; and second, "if to the knowledge of the owner,

[1] See § 183.

[2] [See § 256.]

the charterer, or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy." [1] We must note that in the first case the passengers are travelling as individuals, but the vessel has not taken them on board in the ordinary way of business. She has undertaken her voyage specially, though not exclusively, in their behalf. They must be embodied in the armed forces of the enemy; but in the opinion of the whole Naval Conference this description did not include persons resident abroad who have been summoned to take their places in the ranks, but have not already joined the corps to which they are to belong.[2] This is important in view of the large number of emigrant reservists who will be returning to the colors in the event of an outbreak of war. [France, like other powers, had not ratified the Declaration, and was therefore not bound by it. Yet her Prize Court applied this article of it in condemning *The Federico*, a Spanish vessel captured in 1914 with a number of German and Austrian troops on board, who were returning to fulfil their obligations of military service in their native countries. The court held that they were "embodied" in the armed forces of the enemy within the meaning of the article, in spite of the opposite view which had been taken by the Naval Conference. The mere number of the reservists carried seems to have been sufficient in the opinion of the court to make the ship guilty of unneutral service.[3] Many other seizures were made by the British and French governments, not of the neutral ships themselves but, of enemy passengers of military age travelling on them; but this course of action was a measure of reprisal for the German removal as prisoners of war of all persons in the occupied areas of Belgium and France, who were liable to military service.[4]] The transmission of intelligence is more likely in future to take the form

[1] *Declaration of London*, Article 45.

[2] Report of Drafting Committee, for which see British Parliamentary Papers, *Miscellaneous*, No. 4 (1909), p. 53.

[3] [*Revue Générale de Droit International* (1915). *Jurisprudence*, pp. 17–18.]

[4] [Oppenheim, *International Law*, vol. II, § 413*a*.]

of sending signals or wireless messages than the carriage of despatches; but, whatever plan is adopted, the vessel must not be exclusively engaged in the work, if she is to come under the rules applicable to lesser offences and be liable to the lesser penalty. In the second case it is required that a military detachment of the enemy shall be on board, or one or more persons who during the voyage directly assist the operations of the enemy, for instance by signalling or in some other manner that can be detected. In this case, since soldiers or sailors might travel in civilian clothes, or signals be sent secretly, it is necessary to insist on the knowledge of either owner, charterer, or master.

Ignorance of the outbreak of hostilities, or lack of opportunity for discharging passengers after becoming aware of it, are good defences when a vessel is met at sea while engaged in the performance of such acts as we have just described. She cannot then be condemned.[1] The belligerent cruiser may, however, demand the surrender as prisoners of war of the enemy soldiers or sailors on board, while the vessel is allowed to go on her way.[2] The general rule of International Law is that no person can be removed at sea by a belligerent warship from a neutral vessel which is herself free from capture. But an exception was made in this case, in order that "large passenger steamers under a neutral flag should, if possible, be freed from the costly inconvenience of being taken into a prize court and there detained, perhaps for a prolonged period, merely because a few individuals forming part of the armed forces of a belligerent, but whose military status was unsuspected by the owners or captain of the vessel, were among her passengers." [3] Ignorance of the war on the part of the neutral shipmaster is, however, not to be lightly conceded. He is deemed to be aware of its existence if he "left an enemy port subsequently to the outbreak of hostilities, or a neutral port subsequently to the notification of hostilities

[1] *Declaration of London*, Article 45.

[2] *Ibid.*, Article 47.

[3] Report of British delegation at the Naval Conference, for which see British Parliamentary Papers, *Miscellaneous*, No. 4 (1909), p. 98.

to the power to which such port belongs." [1] But, of course, it is quite possible that a neutral shipmaster might know of the existence of a war, and yet be quite ignorant that he had among his passengers a few belligerent officers or men.[2]

The assimilation of the ship in the cases described above to "a neutral vessel liable to confiscation for carriage of contraband" means much. Her non-contraband cargo, if she has any, will be secure, unless it belongs to her owner or is less than half of her total cargo. Her liability to capture ceases at the termination of her voyage; and as a neutral vessel she cannot be destroyed at sea, unless her preservation would endanger the safety of the capturing warship, or the success of the operations on which it was engaged at the time.[3]

§ 262

The graver offences of unneutral service.

According to the [unratified] Declaration of London unneutral services of the graver and more serious kind render the vessel and any goods on board belonging to her owner liable to confiscation, and place her in the position of a captured enemy merchantman. The acts which subject the neutral vessel to these penalties occur in several sets of circumstances. The first case arises when she takes a "direct part in hostilities." [4] The phrase is broad in order that it may cover many eventualities. It is possible to take part in hostilities without firing a shot. A neutral fishing vessel might show the channel to a fleet advancing to the attack of an enemy squadron, or lay mines or remove them or allow herself to be used for the discharge of torpedoes, or reconnoitre for the enemy, or block wireless messages in his interest. If she did these things under fire, and was injured or destroyed, she would richly deserve her fate. By behavior as an enemy she would forfeit the right to be treated as a neutral. Indeed, it may be questioned whether the penalty of being treated as an enemy merchantman is not too light for some of the possible cases. Ought not, for instance, the

[1] *Declaration of London*, Article 45.

[2] [Cf. *The Svithiod.* L. R. [1920] A. C. 718.]

[3] See § 191.

[4] *Declaration of London*, Article 46.

whole crew of a fishing boat seized while laying mines for the enemy to be detained as prisoners of war, if not shot as unlawful combatants? They must have known that they were performing an act of pronounced hostility, likely to be more beneficial to the side which employed them than any deed of valor done in the course of actual combat. A second case occurs when a neutral vessel "is under the orders or control of an agent placed on board by the enemy government." [1] This is proof, open and irrefutable, that the ship is for the time being an enemy. She must, therefore, be treated as one while the enemy control lasts.[2] The third of the cases provided for takes place when the neutral vessel "is in the exclusive employment of the enemy government." [3] She may be a collier or a repair-ship accompanying the enemy's fleet. When such a service is going on, there will generally be a contract of letting and hiring between the neutral owner and the naval authorities of the enemy, and if this is found on board in the form of a charter party, it will afford the best evidence of the truth of the charge. But other proof will do as long as it is sufficient, the important point being that the employment must be exclusive. In the fourth case the vessel must be "exclusively engaged at the time in the transport of enemy troops or the transmission of intelligence in the interest of the enemy." [3] Here again stress must be laid on the exclusiveness of the engagement. In these circumstances, too, there would generally be a charter party, but sufficient evidence can as a rule be obtained without it. The case differs from the conveyance of troops and transmission of intelligence mentioned in the previous section in that the vessel is devoted to the forbidden service exclusively and permanently. She is, therefore, liable to capture as long as the service lasts, even if she has no troops on board and is not transmitting intelligence at the moment of seizure.[4]

[1] *Declaration of London*, Article 46.

[2] [Cf. *The Thor* (1914) 1 British & Colonial Prize Cases, 229. *The Hanametal* (1914). *Ibid.* 347.] [3] *Declaration of London*, Article 46.

[4] Report of the Drafting Committee, for which see British Parliamentary Papers, *Miscellaneous*, No. 4 (1909), p. 55.

In these four cases, as we have already seen, the delinquent vessel is placed in the position of a captured enemy merchantman, which means that all enemy goods will be confiscated, and all goods will be presumed to be enemy goods till the contrary is proved. The vessel herself may be destroyed at sea without the obligation of compensation which exists when a neutral prize is so disposed of in circumstances which do not amount to extreme necessity.[1]

[1] For the text of the Declaration of London see Higgins, *The Hague Peace Conferences*, pp. 540–566; Whittuck, *International Documents, Appendix*, pp. 256–274; *Supplement to the American Journal of International Law*, vol. III, pp. 190–220. The first two books contain the Report of the Drafting Committee also. For illuminating comments on that part of the Declaration which refers to unneutral service, see Dupuis, *Droit de la Guerre Maritime*, ch. VIII.

# INDEX OF CASES


Adonis, The, 698 and note
Adula, The, 692
Alabama, The, 104, 109, 139, 633, 635, 707
Amiral Ganteaume, The, 434
Amy Warwick, The, 328, 461
Anna, The, 143
Appam, The, 643–44
Arguelles, The, 236
Argun, The, 324
Aryol, The (or Orel), 391
Asturias, The, 395
Atalanta, The, 737

Barrundia (General), case of, 230
Betsy, The, 685
Blond, The, 440
Boedes Lust, The, 315
Britannic, The, 395
Brown *v.* U. S. A., The, 402
Bundesrath, The, 455, 727

Carlotta, The, 449
Carolina, The, 435
Caroline (1904), The, 654
Casa Blanca, German Consul at, 298
Castioni, 240
Cherokee Nation *v.* State of Georgia, 55
Chesapeake, The, 452
Chesterfield, The, 226
Circassian, The, 691
Commercen, The, 730
Cumberland, The, 434
Cutting (Mr.), 222

Daifjie, The, 435
Daimler Co. *v.* Continental Tyre & Rubber Co., 358–59
Delagoa Bay, 108
Depierre, 204
Derfflinger, The, 439 n.
Detroit, The, 218
Don Pantaleon Sa, 287
Dover Castle, The, 546
Dresden, The, 606–607

Edna, The, 361
Ekaterinoslav, The, 324
Elektra, The, 395
Exchange, The, 227

Fanny, The, 363
Federico, The, 741
in re Ferdinand ex-Tsar of Bulgaria, 403–404
Florida, The, 622
Franciska, The, 689, note 2
Franconia, The, 208

General, The, 456
Germania, The, 441 n.
Guiteau, 289

Harmony, The, 356
Herzog, The, 455
Hofer, The, 204
Hoop, The, 334, 336
Huascar, The, 217–218

Imina, The, 731
Indian Chief, The, 357
Investigator, The, 434

Jonge Margaretha, 713
Johanna, The, 436

Kasuga, The, 630
Kim, The, 728
Knacke (J. P.), 204
Knight Commander, The, 468

Lena, The, 645
Leopard, The, 452
Leucade, The, 365
Lusitania, The, 370, 517

Macartney (Sir Halliday), 279
Malacca, The, 216, 506
Maria, The (1799), 107 n., 673
Maria, The (1805), 726 n.
Marianna Flora, The, 451
Marie Glaeser, The, 438
Marie Leonhardt, The, 441
Marquis de Somarveles, The, 446
Medea, The, 719–20
Meunier (Mr.), 240
Mukden, The, 324
Murray (G. W.), 356

Neptunus, The, 689 n. 4
Nereide, The, 363
Neumann (Karl), 546
Nisshin, The, 630

Oldhamia, The, 391
Oleg, The, 391
Olinde Rodrigues, The, 686–87
Ophelia, The, 391
Orel, (or Aryol), The, 391

Paklat, The, 434
Pantaleon Sa (Don), 287–88
Peterburg, The, 216, 506
Porter *v.* Freudenberg, 336
Portugal, The, 395
President *v.* Sitka, 227
Primavera, The, 441 n.
Procurator, The, *v.* Deutches Kohlen Depot Gesellschaft, 441 n.
Proton, The, 432 n.

Ranger, The, 615
Rauscher (Mr.), 239
Reshitelni, The, 604–605

Santissima Trinidad, The, 657
Savarkar (Mr.), 243–44
Scott of U. S. A., 346–47
Sea-Bride, The, 139
Secretary of State for India *v.* Chelikani Rama Rao (1916), 143 n.
Shenandoah, The, 216–17
Sitka, The, 227
Smolensk, The, 506–507
Somers, The, 636
Stert, The, 687
Stigstad, The, 703 n.
Strathclyde, The, 208
Swineherd, The, 561

Thirty Hogsheads of Sugar, 364
Tolen (Ignacio), 204
Trende Sostre, The, 730 n.
Twee Gebroeders, The, 604
Two Friends, The, 450
Tyne, The, 226

Valeria, The, 622
Valentine, The, 643
Venus, The, 358
Vigilantia, The, 354
Virginius, The, 432

Wachusett, The, 622
War Onskan, The, 449 n.
Weeks (Mr.), 237
Whitehill (Mr.), 356
Winslow (a criminal refugee), 239

Yiksang, The, 731 n.
Young Jacob & Johanna, The, 436

Zamora, The, 107 n., 461, 626

# INDEX


Aaland Islands and League of Nations, 575, 599
Abnormal Rights, 113; neutrality, 114; laws of, 113
Abstention, 628–32
Abyssinia, 164
Accretion, 156–57
Acquiescence, 651–52
Adis-Ababa (Treaty of), 164
Admission into International Society, 82–83
Adams (J. Q.), on Russia and the Bering Sea, 178
Adolphus, Gustavus, and Grotius, 27
Africa, modern attempts to partition, 148, 154–56, 161, 166–71; navigation of its Great Rivers, 197–98; International Convention for putting down Slave Trade, 218–21
Agents, diplomatic, *vide* Diplomacy
Air, as a state possession, 143–45; international conference of Paris (1910), 100, 144; convention for regulation (1919), 144; bombardment by, 526; aircraft and crews, 619; passage over neutral territories, 637–39
Aix-la-Chapelle, Congress (1818), 274
*Alabama*, claims, 104, 109, 139, 633, 655, 707
Alaska, commercial companies and seal fisheries, 179
Albanian frontier and the League of Nations, 576
Alexander I of Russia, on Bering Sea arbitration, 178
Alexander II of Russia, attempt to form a common war code, 372–73
Alternat, concerning the signing of a treaty, 268
Ambassadors, displacing heralds or envoys, 271; first sent by Louis XI of France, 272, 273; full or general powers of, 282; instructions, 282–85; official and unofficial acts and privileges, 288–96; in Central and South American countries, give asylum to political offenders, 293
America, *see also* United States of America; effect of discovery on International Law, 146–48, 176–78; its division amongst civilized states, 150
"*Amici*," 583
Amiens Treaty (1803), 367, 561
*Ancipitis usus*, 715
Angary, 623–25
Anglo-Venezuelan Agreement (1897), 260
"*Animus furandi*," 215
Annam — French protectorate (1886), 163
Annexation, 149; Vattel on, 150
Arabi Pasha, 73
Arbitral tribunals, 106–108, 567; Permanent Court of Arbitration, 567–68; Judicial Arbitration Court, 567–68; Proposal to give to International Prize Court the functions of a High Court of Arbitral Justice, 570
Arbitration, 259, 566–81; Hague Permanent Court of, 570
Archangel Fisheries, 140
Aristotle, *The Politics*, 15
Armed neutralities (1780 & 1800), 104, 109, 665–66; on convoy, 674; on blockade, 680–81
Armistices, 555–58
Army followers, 349–350
Arguelles (a Spaniard), 236
Arras, Capitulation of (1640), 92
Arterial Rivers, 198
Asia, its state system, 249–50
Assassination, 540–41
Assistance-hostile, 739
Assurance, letters of, 457
Asylum, Right of, 619
Austin (John), definition of law, 8
Australia, 151–52
Austria-Hungary, externally one state, 52; accepts aid of Russia in conquering Hungary, 131; and Holy Alliance, 132; acquires Bosnia and Herzegovina, 171–72, 247, 306–307; one of the Great Powers, 246
Ayala (Balthazar), *de Jure et Officiis Bellicis*, 25
Azuni (D. A.), on Marine Ordinance of 1681, 664

Balance of Power, theory of, 128–31; not including New World, 132; its modern form, 133

Barcelona, *Consolato del Mare*, printed at, 22
Base of operations, 613–14; discussed by W. E. Hall, 613
Belgium, permanently neutralized, 70; neutrality destroyed by Versailles Treaty, 593; removes from political crimes, murder, or attempted murder of head of a foreign state, 242; and the Great Powers, 246, 253, 276, 593; separated from Holland, 593; neutrality attacked by Germany, 593–94
Belligerency, 64–65, 309; recognition of, 328–31; rights, 328; occupation, 408–411; and right of search, 451; suspected pirates or slave traders, 451; may search vessels, 453; may commandeer an enemy but not a neutral merchantman, 454; subjects in enemy army, 489; warships and neutral ports, 519; belligerent state duties towards neutral states, 603–25; and neutral submarine cables, 607–612; may not prepare for war on neutral territory, 612–17; must obey regulations for protection of neutrality, 617–21; sick and wounded may travel over neutral territory, 617; must make reparation for violated neutrality, 621–25
Benham (Admiral), 218
Bentham (Jeremy), coins phrase "International Law," 7; on theory of natural Law, 30
Bering Sea fisheries, 178–81
Berkeley (Admiral), disavowed by British government, 452
Berlin Treaty (1878), 39, 58, 87, 100, 247, 303–304
Berlin West African Congress, 598
Bernard (Richard), "Bible Battels" or —, 7
Berne Convention (1886), 6
Bismarck (Prince) and the Balance of Powers, 129, 480
Black Sea Conference, 303
Blockade, by submarine mines, 513, 678–703; nature and history, 678–83; Grotius allowed, 678; without ships, 687; essentials of, 686–92; different kinds, 683–85; by notification, 683; always includes use of ships, 688; as to submarines, 688–89; cessation of, 691; knowledge of, 692–94; violation of, 694–97; penalty for breach of, 698–702
Blüntschli (J. K.), accepts volunteer navy, 501; on contraband, 713
Bodin (Jean), forerunner of Austin, 9
Boer Republic, 83, 116
Boer War and requisitions, 424
Bombardments, 521–26; disallowed to recover ransom for, 555; by aircraft, 526
Bonaparte (Joseph), 303
Books and works of art in enemy territory, 446
Booty, 406–408
Bosphorus, 184–86; a neutralized waterway, 559
Bradford (Attorney-General), on ships in foreign ports, 226
Brazil, 86, 218, 332–33, 481, 570, 609, 622
British nationality and status of Alien Acts, 203
British North Borneo Company, 66
British Prize Court, may adjudicate after Peace is declared, 561
British self-governing colonies and India as international persons, 63
British South Africa Company, 68, 175, 310
Brussels Conferences of 1874 and 1880, 372, 411; on guerilla troops, 491; discussed isolated and sudden defence by unorganized troops, 493, 494–95; on bombardments, 522; on explosive projectiles, 530; on devastation, 535
Brussels Conference on slave trade (1890), 218–21, 338
Bryce (James), *Holy Roman Empire*, 20, 23; *Impressions of South Africa*, 83
Buenos Aires, recognized as independent, 86
Bulgaria, 57, 305
Bullets, tipped with sulphuric acid not allowed, 529; explosive or expanding, 532
Bundesstaat, 60–63, 79
Bynkershoek (Cornelius van), 97; *De Dominio Maris*, 138; on neutral waters, 387; on recapture at sea, 449; on *non-hostes*, 583; on guilt in contraband, 730

Cabot (John and Sebastian), 146
Calvo (Charles), exemption of private property from capture at sea,

480; condemned a volunteer navy, 501
Camden (Lord), non-Dutch subjects on St. Eustatius, 356
Canada, a sovereign state, 48; sea fisheries, 190–93
Canon law and International Law, 20–24
Canning (George), 132
Capitulations, 232, 553–55
Capture at sea, its early growth, 24; applies to all enemy property, 432; exceptions, 433–35; enemy goods under neutral flag, 441–42; recapture, 448–51; prizes for adjudication, 464–79; proposal to exempt private property from hostile seizure, 477–481
Captured towns, inhabitants must be protected, 399
Cargo, 351–52, 362–63, 443, 452
Cartels, 550
Cartel Ships, 435
Carteret (Captain), 150
Cass (General), 204; on commercial blockade, 683
Castioni (a Swiss), extradition refused, 240
Cavell, Edith, 416
Cellamare, Prince of, 287
Central American Peace Conference (1907), 580
Central American Court of Justice, 580
Cession, 89–94, 157–59; by sale, 157; gift or exchange, 158
Chargés d'Affaires, 274
Charlemagne, 19
Chartered Companies, 174–75; and War, 310
Chile, insurrection of congressional party, 332–33
China, as a subject of International Law, 82; and the Great Powers, 249–50; leases certain territories, 168–71; Yangtse-Kiang agreement with Great Britain, 173; Japanese War, 249; Boxer troubles, 292; reprisals from France, 314; Russia erects wireless telegraphy station in China, 650; attitude towards the Declaration of London, 667
Christina, Queen of Sweden and Grotius, 26
Citizenship, in relation to enemy character, 354–59
Civil Law, *see* Jus Civile
Civilized communities not being states in International Law, 64
Clayton-Bulwer Treaty (1850), 117, 188, 257
Cleveland (President), on boundary of British Guiana and Venezuela, 260; refuses to recall Mr. Keiley, 278; dismisses Lord Sackville, 280–81
Client states, 56–60
Coaling, time allowed for, 642
Coast fisheries, 139
Coasting steamers no protection, 437
Cogordan (George), *Nationalité*, 90
Colombia, Republic of, 86
Colonial Protectorates, 69, 162–66
Columbia River, 153
Combatants, 375–77
Comity of Nations, 10
Commercial Blockade, 683
Commercial treaty between America and Italy (1871), 347
Composite States, 51
Compromise, 568
Concentration camps, 357
Concert of Europe, 250
Condominium, 79, 171–72
Confederations, 55, 60–63
Congo Free State, 83; added to Belgium, 84–87; Congo Conference, 101; maladminstration, 161; preferential right of succession to France, 173; Congo River, 197; partial neutralization, 598–99
Conquest, 159–60
Consent of Nations, 95
*Consolato del Mare*, 16; date of, 22, 443, 448, 660
Constantine (Emperor), 19
Constantinople, 73
Consuls, different functions, 232–33, 296–99; no diplomatic immunities, 297; *Exequaturs*, 297; in eastern countries exercise jurisdiction, 298
Consular Convention, Austria and U. S. A., 210
Consular Prize Courts, 589
Contamination of water may be allowed, 542
Continuous Voyage, doctrine of, 108, 456, 697, 725–29; Sir W. Scott on, 726
Contraband, trade in, 704–36; what articles are, 709–20; absolute or

conditional, 712; English doctrine, 710; lists liable to alteration, 720–25; guilt in, 729–31; transport not bargain sale, 729; belligerent destination, 730; offence complete when vessel leaves neutral waters, 731; is only concerned with trade, 731; penalty for carrying, 731–36; contraband goods should be confiscated, 731
Contributions, 423, 425–27
Conventions, (1878), 78; (1883), North Sea Fisheries, 190; (1824), Russia and America, 178
Converted Merchantmen, 505–10
Convoy, 455, 672–77
Copenhagen Treaty, (1857), 183
Copyright, 6
Corfu and Paxo (Ionian Islands), neutralized, 597; neutralization infringed in Great War, 597–9
Corinth Canal, 189
Corporations as subjects of International Law, 65–69
Credence, letter of, 282
Crete, 72; in connection with Greece and Turkey, 73; pacific blockade, 318
Crew of a ship in war time, 348–49
Crimean War, took Christian population of Turkey out of hands of Russia, 247
Cuba, constitution, President Palma, General Gomez, 59, 94, 122; and Spain, 257, 380, 609, 690
*Cum barbaris aeternum omnibus a Graecis bellum est, eritque*, 15
Cushing (Mr.), on the Sitka case, 227
Custom, 30
Cyprus, 72, 172
Czecho-Slavs, 330–31

Dampier, William, 150
Dana (R. H.), on The "Hovering Acts," 182; on immunity of ambassadors' private property, 298; Prize Court procedure, 464; Angary, 623–25
Danube, 194, 196
Danzig, 70, 79; under high commission, 575
Dardanelles, 184–86; a neutralized waterway, 599
Declarations of 1907 and 1908 on the Mediterranean, on the states in Baltic and the North Sea, 117; *see also* London, Paris, and St. Petersburg.
Deep-sea fishing vessels may be captured, 436
De-Horsey (Admiral) and the "Huascar," 217
Delagoa Bay, 108, 151
Denmark, sound dues, 183
Delaware Bay, 142
*délits politiques complexes*, 241
Depierre (Victor), 204
Deportations, 417
Despagnet (Franz), *Dr. Intern. Pub.*, 90; on extradition, 242–43; on trading with enemy, 334
Destruction of prizes at sea, 464–70
Devastation, 534–38
Diligence defined as used in connection with neutral duty towards belligerents, 631
Diplomatic immunities, 14; agents of foreign states, 224, 271–307; various classes of, 272–76; breaking off intercourse, 276; when diplomatic mission ceases, 284; immunities of, 292–96
Discovery, geographical, not sufficient for sovereignty, 147–48
Discussion as to length of stay of warships in neutral ports, 641
Domicile, 206–207; in law, 353; in relation to enemy character, 354–59
Double Nationality, 201
*Droit*, French word, 36
Dumba (Dr.), Austrian ambassador recalled, 281
Dunant (Mons.), and war wounded, 384
Dupuis (Charles), *La Guerre Maritime et les Doctrines Anglaises*, 679, 705; *Le Droit de la Guerre Maritime*, 703

Eastern Rumelia, 57
East India Company, 68
Economic blockade, 545
Effective blockade, 653
Egan (Mr.), receives Chilian refugees, 293
Egypt, England and France joint then England alone, 73; convention between Great Britain and Egypt, 74; with France, 74; English protectorate, 74, 133–34, 169–71; and Consular Courts, 234; and the Great Powers, 234–35, 247

Egyptian Soudan, *see* Soudan
Elbe, 194, 196
Ellenborough (Lord), on sequestrations of private property, 404
Embargo, 119, 314–15
Emerton, *Medieval Europe*, 20
Enemy, character, 345–54; country, 350–52; persons, 367–71; property in land, 400–430; sea-borne goods, 443–51; public and private vessels, 432–43; postal correspondence to and from a blockaded port (Hague Convention (1907) on), 444
Enemy ships, enemy goods, 661
England, *see also* Great Britain; rule of war (1756), 362
Envoy or envoy extraordinary, 273
Equality, "Equality of States," 46; in International Law, 245; facts contrary to equality, 245 — ; state of, in transition, 252–55; can legal be separated from political equality, 252; doctrine etiquette and ceremony, 265–66; rules of precedence, 267–68
Erie, Lake, 158
European Concert, *see* Great Powers
Exemption from capture of enemy property at sea, 481–88
Expanding bullets, 530
Expeditions, warlike, 612–17
Explosive bullets, 40
Exterritoriality, fiction of, 210–13
Extradition, defined, 235; 1st recorded, 236; mainly dependent on treaties, 236; fugitive criminals, 236; Act of 1870, 237; treaties, 238–44; British statute law contained in Acts (of 1870, 1872 & 1895), 239

False Colors allowed, 540
Fauchille (Paul), *Du Blocus Maritime*, 679; *Droit International Public*, 719
Federal Unions described, 51–4
Feudalism, 22–3
Figgis (J. N.), *From Grotius to Gerson*, 21, 25
Fines, 423, 427–30
Finett (Sir John), 266
Fish (Mr. ), on U. S. A. and the rest of the Continent, 258
Fishery convention (1839), 141–42
Fishing smacks and market boats, 436
Flags of truce, 538, 548–50
Flinders (Commander), 433–34
Foreign Enlistment Acts of America and Great Britain, 589–90
Foreign Jurisdiction Acts (1843 and 1890), 214, 233–34
Foreign pirates, 65
Foreign sovereigns and their suites, 223–24
Formosa, pacific blockade of, 316–17
France, intervenes in Egypt, 73–75, 134; treaty with U. S. A. (1770), 87; French marine ordinance (1681), 110; restores Ferdinand VII of Spain, 132; claims in New World, 146; cedes Louisiana to Spain, 158; Alsace and part of Lorraine to Germany, 158; agreements with England as to Egypt, Morocco, and Newfoundland fisheries, 187, 249, 190; its rules as to citizenship, 199–201; foreign merchantmen, 208–10; consular capitulations, 234; colonial protectorates over Madagascar and Zanzibar, 235; operations against China, 313; pacific blockade, 316–20; expels German subjects from the Seine (1870), 368; captured works of art, 420; France and America allow ransom, 448; capture of private property at sea, 480; private ships, 504; acquires neutralized Savoy, 595; different views from England as to coal for belligerent warships, 645–46; doctrine of infection, 661; blockade, 678–79, 681
Francs-Tireurs, 491
Free ships, free goods, 106, 443, 661
Freeman (E. A.), *Norman Conquest*, 23
Fry (Sir Edward), helped to produce draft convention on the creation of a Judicial Arbitration Court, 570
Fryatt, Captain, 349
Fuca, Straits of, 228–30
Fugitive Criminals, 228–230
Fugitive slaves, 230–32
Fundy, Bay of, 141

Gaius, definition of *Jus Gentium*, 33
Gallatin (Mr.), arrest of his coachman, 293
Game-law, on international, 181
Gas, at Ypres Battle, 531; masks, 531

Geffcken accepts volunteer navy, 503
"General Consent," 35
Genêt (Mr.), action when ambassador, 280, 460, 588
Geneva Arbitration (1871), 613, 631–34, 655, 707
Geneva Conventions, 25, 40, 42, 378, 384–95, 399–400, 538
Gentilis, Abericus, *de Jure Belli*, 25, 96
Germany, confederation, 60–61; empire, 62; constitution of (Aug. 11, 1919), 62; recognizes Congo Free State, 87; agrees with Great Britain as to Western Pacific, 121; annexes part of New Guinea, 150–51; gains Alsace and part of Lorraine, 158; one of Great Powers, Prussia being merged in it, 246; agrees with France as to "pacific penetration" of Morocco, 249; tries its subjects who are accused of war crime, 546; gave Great Britain compensation for sinking colliers, 624; objects to 24 hours' rule for warships, 641; and three months, rule for coaling, 643; establishes with Great Britain joint blockade of Venezuelan ports, 697; difficulty of seriously injuring it by blockade, 683–85; opposes doctrine of continuous voyages, 727
Ghent, Treaty of (1814), 191, 212, 560
Glass, *Marine International Law*, 688 n.
Grant (G.), Capitulation at Appomattox, 554
Great Britain, signs copyright convention, 6; agrees with U. S. A. in Treaty of Washington (1871), 38; proposes Naval Conference, 44; an Incorporate Union, 52; and Ionian Islands, 56; and Cyprus, 78; the Transvaal, 116; Liberia, 84–85; intervenes in (*a*) Mexico, 124; (*b*) Denmark, 126; (*c*) Egypt, 133–34; annexes part of New Guinea, 150; claims in the New World, 146, 152–; spheres of influence in Africa, 167; vacates a portion of East Africa, 169–71; maintains freedom of Bering Sea, 179; purchases Suez Canal shares, 186; its controversies with France and U. S. A., 189–93; its citizenship, 199–203; sets up courts in Western Pacific, 214; one of the Great Powers, 246; protectorate over Mosquito Coast, 257; breaks intercourse with France (1793), 277; its views as to pacific blockade, 316–20; ultimatum to Germany before Great War, 326–27; American Civil War, 330; and the Baltic Powers forbid ransom, 447; U. S. A. Treaty, 1794, on Prize Courts, 463; exemption of private property from capture at sea, 477–81; private ships, 504; negotiates peace with Boer leaders in the field, 559; closes cables to South Africa, 608–609; requisitions Swedish and Dutch vessels in British ports, 625; convoy, 670–73; blockade, 678–703; and Germany joint blockade of Venezuelan ports, 683–85; doctrine of conditional contraband, 712–16; penalty for contraband in Great War, 732
Great Lakes, agreement between Great Britain and U. S. A. to restrict their naval forces, 592
Great Powers, their predominance, 42, 88, 118, 133–34, 246–51, 592–95; admission of Turkey, 88; intervention in Lebanon, 128; neutralize Suez Canal, 186, 599–600; exercise sway beyond Europe, 247–51; in Egypt, 247; in Africa, 248; occasionally in America, 260; individually have no supremacy, 253; may appoint a representative committee from Leading States, 254; Great Powers of Europe in Europe and Africa, 245–51, 252–55; no power in Asia, 251–52; a possible World Concert, 251–55; primacy of U. S. A. in America, 255–265; possibly of an American Concert, 262–65
Great War, belligerent states suspended payment of debts to enemy subjects, 406; convoy, 676; blockade, 680, 698–703; saddle, draught and pack animals contraband, 711; Great Britain gave up distinction between classes of contraband, 718–19; restored same, 718: destination of ships, 723–25; contraband, 734–36

Greece, rudimentary International Law, 16–17; and Great War, 122–24; and Great Powers, 246; and Pacific Blockade, 317–19; agrees to maintain neutrality of Corfu and Paxo, 597
Gregory VII, Pope, 20
Groot (Huig van), *see* Grotius (Hugo)
Grote (George), *History of Greece*, 14
Grotius (Hugo), publishes *De Jure Belli ac Pacis*, 7, 22; a great reformer, 23–24; sketch of life, 26–28; his horror of cruelty, 27; his views on natural law, 30–33; doctrine of "General Consent" as foundation of an instituted Law of Nations, 36; his views as to state succession, 89–90; *Temperamenta Belli*, 97; freedom of the seas (1609), 177; armed forces may march through a country, 225; states equal in International Law, 245; resident embassies, 272; definition of war, 309; enemy persons, 367; violence in war, 371–72; *temperamenta Belli*, 377–78, 408–409, 534–35; invasions, 408; recapture, 448; devastation, 534; poison, 541; *Medii*, 583; dangers of neutrality, 585; neutrals should make treaties with both belligerents, 587; passage of troops through neutral countries, 635; blockade, 678; contraband, 705, 709
Guarantees, laws of, 76
Guerilla troops, 490–93
Gyllenborg (Count) (1717), immunities of ambassadors, 286

Hague Conferences, form a rudimentary international legislature, 41, 45, 46, 99, 107–108; their origin and objects, 41–42, 250–51; hopes to meet in a continuous series, 43; representative of the Pope refused admission, 76; convention on laws and customs of land war, 373; on the Geneva Convention, 385; bombardment, 512; devastation, 535; stratagems, 538; international commissions of inquiry, 564–66
Hague Conference of 1899, its output, 43, 99; attempt to establish an International Prize Court, 107–108; accepted by American International Congress at Mexico, 263; on army followers, 350; its code for land warfare, 372–75; forbids refusal of quarter, 376; provides for prisoners of war, 377; limits booty, 406–408; guerilla troops, 490–93; levies *en masse*, 493–96; naval bombardments, 524; bombardments in land warfare, 521; on devastation, 535; improper use of flags and uniforms, 538–40; flags of truce, 548–50; provides for international commissions of enquiry, 564; establishes permanent court of arbitration, 567
Hague Conference of 1899, output, 43, 99; attempt to establish an International Prize Court, 254; converted merchantmen, 305; enemy merchantmen in ports of belligerents, 320; declarations of war, 321–28; enemies' rights to sue in each other's court, 335–37; customs of war on land discussed, 335–37; all persons fighting in army in same position, 346; crews of merchant vessels of enemy, 348–50, 377; camp followers may be made prisoners of war, 349–50; neutral subjects in occupied territory, 350–51; code for land warfare, 372–75; forbids refusal of quarter, 376; prisoners of war, 377–84; religious and medical staff may not be captured, 379; and the Great War, 383–84; applications of Geneva Convention to war at sea, 388–394, 433, 446–47; booty, 407–408; occupied territory, 411–417; submarine cables, 422; requisitions, 423; immunity for vessels on religious, philanthropic, and scientific missions, 431; enemy merchantmen and cargoes at beginning of war, 437, 446; cargo on exempt ships, 446; postal correspondence of enemy inviolable, 446–47; capture at sea, 468, 478; International Prize Court, 470; guerilla troops, 490–93; levies *en masse*, 493–96; regulations as to conversion of merchantmen into warships, 505–10; submarine mines, 511 —; bombardments, 521–26;

aerostatics, 527; poisoned arms, 531; flags, flags of truce, uniforms, 538–40, 548–50; state compensation, 543; capitulations, 553–55; armistices, 555–58; International Commissions of Inquiry, 565; Permanent Court of Arbitration, 568–69; fails to create a judicial arbitration court, 570; forbids hostilities in neutral territory, 603–607; chase of a ship must cease on neutral waters, 604; neutral ships in maritime war, 613; passage over neutral territory for sick and wounded, 617; neutrals may not supply war material, 630; nor set up Prize Courts in neutral countries, 635; recruitment for belligerent forces, and undue stay of belligerent warships 639; number of warships allowed in a neutral port, 640; establishment of belligerent information stations, 649; neutral has a right to appeal in an International Prize Court, if belligerent makes a capture in its waters, 653; fails to formulate whole law of contraband, but makes a list of absolute contraband, 711–18; Germany's view on continuous voyage, 727; mail bags may not be searched, 739

Hale (Matthew), an ambassador may be tried for murder, 288

Hall (S. S.), new forms of submarines, 520

Hall (W. E.), "Foreign Jurisdiction of British Crown," 70; piracy, 218–19; territorial crime, 221; ambiguous sovereignty, 366; what makes belligerent territory, 366; enemy and neutral vessels, 465; exemption of private property from capture at sea, 480; proposed Prussian volunteer navy, 505; term "base of operations," 613; contraband goods, 710; unneutral service, 737–738; analogues of contraband, 738

Hanover, a separate International Person, 53

Hautefeuille (J. B.), *Droit des Nations Neutres*, 10, 99

Havana Treaty (1903), 122

Hay-Pauncefote Treaty, 41, 117, 188–89, 300

Heffter (A. G.), on contraband, 713

Henry IV, Emperor, 20

Henry II of England, 79

Heralds, 15

Hesse-Cassel, Napoleon's title by conquest, 159

High seas, claims to sovereignty over, 175–76; freedom of, 177

Hobbes (Thomas), *De Cive*, 35

Holland (T. E.), "European Concert in Eastern Question," 74; who pays compensation, 422; destruction of houses and farms, 427; classification of neutral duties, 628; contraband, 713; unneutral and enemy service, 738

Holland, signs Suez Canal neutralization, 40, 187; makes treaties to establish the rule "free ships, free goods," 105–106, 661; invited to Naval Conference of London, 251; reprisals against Venezuela, 314; wanted an interval between declaration and attack, 326; position after Great War, 340; refused to give up Kaiser, 547; separated from Luxemburg, 595; immunities of convoyed vessels, 672–77; originates blockade, 678–79

Holls, recommends special mediation, 565

Holy Alliance, 132

Holy Roman Empire, 20, 23

Hooker (Richard), definition of law, 9

Horses, 710–711

Hovering Acts, British, 182

Hübner, *De la Saisie des Bâtements Neutres* (1759), 584

Humanity and intervention, 127–28

Hussein Kemel Pasha, 74

Iceland, 53

Immunities of ambassadors, 285–96

Inalienable allegiance, 205

Incorporate Unions described, 51–4

Independence, recognition of, 82–88; definition, 115

India, native states, 55

Indian tribes of North America, 55

Individuals, hardly subjects of International Law, 65

Indivisibility of sovereignty, 77

Infection, reference to ship cargo, 661

Information Bureau, for prisoners, 382
Inhabitants of an occupied district, 494–96
"Innocent Passage," 193, 635
Institute of International Law (or *Institut de Droit International*), seeks to solve difficulties, 6; its work and method, 98; and the Marine League, 139; waters, 139–140; meeting at Lausanne (1888) on occupation, 154; voted in 1883 for right of jurisdiction over foreigners for acts outside territory, 223; extra-territorial crime, 221–223; defines political offences, 240; pacific blockade, 318; treaties, 341; military code, 372–75; maritime code, 464–81; *Règlement International des Prises Maritimes*, 467; on guerilla troops, 491; submarine mines, 514; submarine cables, 607–612; on bombardments, 524; neutral must refuse dispatches giving assistance to a belligerent, 610; manual of maritime warfare, 610; allows continuance on high seas of pursuit begun in territorial waters, 655–57; contraband, 714; doctrine of "continuous voyages," 726–27
Insurgency, defined, 218; recognition, 331–33
Interference by neutral powers, 543
International comity, 10
International commissions of enquiry, 564–66
International conferences, 106–108
International courts, 234
International Justice, Permanent Court of, 571
International Law, definition, 1, 15; name given by J. Bentham, 7–8; French and German names *Droit International* and *Das Völkerrecht*, 7; nature and method, 8–16; history, 14–48; Period i, 14–17; Period ii, 17–24; Period iii, 24–26; subjects, 47–94; regards sovereignty as territorial, 50, 51, 136; admission of new subjects, 82–88; its sources and divisions, 95–114; its rules parts of the law of civilized states, 460–63; trading in contraband at risk of trader, 706
International Law Association, 98
International morality, 9, 36, 148
International persons, 47
International Prize Court, 44, 108, 251, 470–77, 569–70, 651–54; judges enjoy diplomatic privileges, 471; jurisdiction, 472; law it administers, 472–75; not used in Great War, 476
International state papers, 108–110
International unions, 250
Interning, 617–618
Intervention, its nature, 119–120; mediation, 121, 124; balance of power, 128–31; when unjustifiable, 131–32; in Egypt, 133–34; Schleswig-Holstein, 139; doctrine of war intervention, 133–34
Ionian Islands, 56
Involuntary restrictions on freedom, 118–119
Iraq, Feisal king of, 80; *see also* Mesopotamia
Italy, occupies Rome and passes Law of Guarantees, 76; assumes part of papal debt, 93; relations with Abyssinia, 194; one of the Great Powers, 246; on invitation to join London Conference one of the Great Powers, 594; favors exemption of private property from capture at sea, 497; Italian Prize Court, 561

Japan and Korea, 59–60; a subject of International Law, 82; Port Arthur, 169; abolished consular jurisdiction, 235; and the Great Powers, 249–50; and Prize Courts, 254; attack on Russia not treacherous, 323–325; crews of neutral ships, 348; good treatment of Russian prisoners, 382; method of treating requisitions, 424; regulations concerning captures at sea, 468; private ships, 504; Japanese Prize Court may adjudicate after peace is declared, 561; convoy, 672–77; doctrine of continuous voyage, 725–29
Jefferson (Thomas), on American foreign policy, 256; on duties of neutral states, 588; on maritime capture, 663; trade in contraband, 706–707
Joubert (General), Boer general, 522
Judicial Arbitration Court, 569; failed, 570
Jurisdiction of states, over foreigners

within their colonial protectorates, 163; over persons and things within their territory, 199–213; over ships on high seas, 214–18; over subjects abroad, 213–14; over pirates, 214–16; over foreigners for offences committed abroad, 221–22; exceptions to ordinary rules, 223–35
*Jus Civile*, 6, 8, 26, 33
*Jus Feciale*, 16
*Jus Gentium*, 7, 25, 29, 35, 138
*Jus Naturale*, 25, 29, 35, 147
*Jus Postliminii* or postliminy, 448, 459
*Jus Sanguinis*, 201
*Jus Soli*, 201

Karlstad, Treaty of (1905), 53, 579
Kent (James), 98, 663
Khalifa, 74
Khedive of Egypt, 73
Kiaou-Chou Bay, 168
Kiel Canal, 189
Kinship, basis of ancient society, 14–16
Kleen (Richard), *Contrabande de Guerre*, 713
Klüber (J. L.), on contraband, 714
Korea and Japan, 59–60, 556
Kosmos line of ships, 648

Lado Enclave, 171
Landsturm, the German, 494
Langridge, 529
Law, Austin: definition, 8; Hooker: definition, 9; modern English notion of, 36; of the Rhodians, 16; various kinds of law, 33
Law Making Treaties, 39–41
League of Nations, 45, 63; as a subject of International Law, 77–78; description of, 78; exercises protectorate over Saar Basin, 79; permanent mandatory commission, 80; covenant, 100, 251; and the Monroe Doctrine, 259; and Permanent Court of International Justice, 276; on permanence of treaties, 306, 571–81; on arms, 572; preservation of political independence of states, 577
Leased territories, 167–71
Lebanon, 80
Lebanon (Mount), 128
Lee (Attorney-General), on ships entering foreign ports, 226
Legal consequences of peace, 560–62
Legation, 224; right of, 276
*Leges Wisbuenses*, 22
Leo III, Pope, 19
Leopold II of Belgium and the Congo, 84
Levies *en masse*, 493–96
*Lex loci rei sitae*, 207
*Lex talionis*, 312
Liberia, Republic, 84–85
Licenses to trade, 424, 552–53
Lieber (Dr.), first modern war code, 372; this and other codes only binding on those who draw them up, 372
Limburg, and the Germans in evacuating Belgium, 618
Limitations, statute of in war time, 404
Lincoln (President), 330
Liquid fire projector, 533
Livy, *History*, 15–16
Locke (John), civil law, 6
London Conference (1908–9), in Prize Law, 44
London, Declaration of, 44, 104, 254, 360, 362, 443; on right to search, 452; captures at sea, 468, 476; on neutrality, 594; convoy, 675; blockade, 679; blockade of neutral coasts, 687; violation of blockade, 694–703; contraband goods, 718; variable contraband, 720–25; articles exclusively for sick and wounded not contraband, 721; abandoned July 7, 1916, 724; penalty for contraband, 732; unneutral service, 739
London, Treaty of (1863), 122; Treaty of (1871), 185, 506
Louis XI of France, first employs ambassadors, 272
Louis XIV of France, 275, 664
Louisiana, boundaries of, 153
Louvain, burning of, 430
Louvre, restoration of works of art, 419–20
Lushington (Dr.), on Leucade-The, 365
Luxembourg, 70, 247, 276; occupation during Great War, 413; neutrality destroyed by Versailles Treaty, 593–94; separated from Holland, 595; neutrality violated by Germany (1914), 595

Machiavelli (N.), 21, 24, 112, 585
McKinley (President), on ships carrying mails, 442
MacMahon (Marshal), arbitration between Great Britain and Portugal on Delagoa Bay, 108, 151
Madagascar, a French protectorate (1885), then a colony (1896), 164
Madrid, Treaty of (1880), 249
Magdeburg, sack of, 27
Mail bags, 442; no immunity in Great War, 442
Maine (H. S.), 110 n.
*Majestas Populi Romani* as a god, 17
*Mandatum* in Roman Law, 81
Manning (W.), 98
Mansfield (Lord), the Silesian loan controversy, 405
Marcy (Mr.), American Secretary, territorial sovereignty, 208
Marine league, 138, 182
Marine ordinance (1681), 664
Maritime capture, 660–66, 670–71
Maritime ceremonials, 269–70
Maritime code, 16; ancient codes, 22
Maritime Rights, 729
Marque, Letters of, 312, 501
Marriages of foreigners, 289
Marshall (Chief Justice), judgment in case of the *Exchange*, 227
Martens (G. F. de), on neutrality, 586
Maurice, Prince of Nassau, and Grotius, 26
Maximilian, Emperor of Mexico, 257
Means of destruction, 395
Mediation, 121; special, 566
*Medii*, 583
Mehemet Ali, 73
Mello (Admiral de), 218
Merchantmen, may be searched in war time, 452; belligerent may fight, 452; a neutral must submit, 452; immunity, 437–38; those which are convertible into warships, 437; English and American views, 507; neutrals must be considered, 508–509; converted merchantmen used in Great War, 510
Mesopotamia, 80; *see also* Iraq
Meunier, the Anarchist, 240
Mexico, 86, 124, 154, 257; and U. S. A. assisted five Central American Republics, 264, 559, 666–68, 687
Michigan, navigation of Lake, 197
Military Commission at St. Petersburg, on explosive projectiles, 530
Military necessity, 374
Military occupation, 411–13, 421–23
Ministers (diplomatic agents), 273; plenipotentiary, 273–74; resident accredited to sovereigns, 274
Mixed commission, 173
Mixed tribunals, 234
Monroe Doctrine, 130, 256–61; imposes obligations, 260; one of its purposes fulfilled by Washington Treaty (1921), 261
Montenegro, 87, 100
Moore (J. B.), *International Arbitration* (vol. i, 667–68), 38
Morocco Conference (1906), 249
Municipal law and morality, 12
Murchison (Mr.), conduct as ambassador, 280
Mustard gas, legality? 531

Napoleon Bonaparte, 118, 159; and balanced powers, 129; and Great Powers, 246; arrested British subjects in France, 367, 552
Napoleon III, 129
Natal, 154
Natives, rights of, 148, 155–56
Natural Born Subjects, 199
Natural law, 29–39
Naturalization, 201–206
Naval Conference of London (1908–1909), 44, 352; ships in war, 360; cargoes, 361–62; captures at sea, 468, 476; converted merchantmen, 505, 510; convoy, 675, 694; contraband, 716, 720, 725; continuous voyage, 727; unneutral transport of persons, 740
Naval Prize Act (1864), 458, 459
*Naval Prize Law Manual* on contraband, 713
Naval stores, 710–11
*Necessary Law* of Vattel, 36
Negotiation, 224
*Nemo potest exuere patriam*, 204
Netherlands, kingdom, 593; Netherlands Over-seas Trust, 701
Nettleship, (article in *Journal of Philology*, xiii, no. 26), 17
Neutral blockade runners, 65
Neutral commerce, 658–77
Neutral country, trade during war, 735
Neutral cruiser must not offer convoy, 676–77

Neutral duties towards belligerents, 628–57
Neutral individuals, with regard to belligerents, 583–84; law of persons, 601–602; may lend money to belligerent states, 630; growth of neutral commerce, 658–59; nature of restrictions on it, 658–72; forbidden service, 740–43
Neutral men of war, free from search, 452
Neutral merchantmen, 456
Neutral persons, 601–2
Neutral powers, 655–57
Neutral ship-owners, 734
Neutral sovereigns may admit prizes of belligerent cruisers into harbors, 465
Neutral states, 590–92; neutralized portions of a state, 595–99; laws of, 601–12; and belligerent states, 583–90; duties of belligerents towards them, 603–607, 617–21; their duties towards belligerent states, 628–32; auction sales of war goods, 631; must not allow a Prize Court, 634; prevent increase of belligerent war vessels in its ports, 644–45; prevent belligerent vessels taking on board frequent and undue supply of permitted goods, 645–49; not allow information stations, 649–50; acquiescence, 651–52; Reparation, 654–55; means of protecting neutrality, 652–57; not bound to stop contraband trade of their subjects, 705–709
Neutral subjects, in a fighting army, 489; may lend money to belligerents, 630
Neutral territory, hostile acts not permitted in, 603–607
Neutralized waterway, 599–600
Neutrality, 582–743; obligations, 109; law of, 221; defined, 582; history, 582–90; term as first used in 17th century, 583; distinct from neutralization, 590–93; divisions of law of, 601–602
Neutralization, meaning, 590–92; neutralized provinces, 595–99; case of Congo, 598
Newfoundland fisheries, 189–92
New Guinea, 149–51
New Hebrides, 173
Nice ceded to France, 129
Nicholas II (of Russia), 41
Niemen River partly international, 196
Niger, treaties concerning basin of, 156, 197
Non-combatants, 395–97
Non-hostile intercourse of belligerents, 548–58
*Non recte vehamus sine fraude tamen vendimus*, 730
Non-territorial Possessions, 136–37
Normal Rights, 113
North Atlantic coast fisheries, 142, 192
North Sea Commission (1905), 565
North and south poles, 151
Norway, 52, 86, 579
Notification of blockade, 689–92
Notoriety, doctrine of and blockade, 689
Nyassaland, 67

Oaks (in a forest), French ruling on, 418
Obligations, 2
Occupation, military, 350–52, 408–411
Occupation, title by, 108, 146–56
Oléron, laws of, 22
Olney (Mr.), immunity of merchant ships, 230
Ontario, Lake, 138
Oppenheim (L), division of treaties, 99, 121; on military possession with sovereignty, 410; unneutral service, 738
Orange Free State, 116
Oregon Boundary Commission, 152–53
Ortolan (E.), jurisdiction over public ships in foreign ports, 227; on *res ancipitis usus*, 714

Pacati, 583
Pacific blockade, 119, 316; divergent views of France and England, 316–20
Pacific islands, jurisdiction over, 214
Palma (President), 58, 188–89
Panama Canal, 41, 86, 188–89, 300, 599–600
Panama Congress (1826), 285
Pan-American movement, 262–65
Pan-American Union, 264
Papacy, 18–20; subject of International Law, 76; in Great War, 77

Paper Blockade, 683
Parana River, 197
Paraguay River, 197
Pardessus (F. M.), *Us et Coutumes de la Mer*, 16
Paris Conference (1856), 39
Paris Declaration, infringed in Great War, 39–40, 100–106, 669–70; on neutral flag, 445; on privateers, 501, 666–72; not signed by America, China, Spain and Mexico, 666–67; did not mention convoy, 674; blockade, 681–82, 689
Paris, Treaty of (1856), 39, 82, 118, 185, 194, 247, 338–39, 666–67
Paris Treaty (1898), 58; (1920), 180
Paris Tribunal (1893), 180
Part sovereign states, 47, 54; defined 55, 116
Passports, 551
Patron state, 57
Peace and its preservation, and legal effects of conclusion, 559–81
Perels (F.), *Seerecht*, 139
Permanent Court of Arbitration, 567
Permanent Court of International Justice, 78; established by League of Nations, 570; may decide a case *ex aequo et bono*, 578
Permanent legations, 273
Permanently neutralized states, 70
Persia, a subject of International Law, 82
Personal property, 207; in enemy country, 401–405
Personal unions, 53–54
Philippines, The, 158
Phillimore (Sir Robert), 98
Phillipson (C.), *International Law and Custom of Ancient Greece and Rome*, 14
Piracy, 214, 216; distinction between piracy *jure gentium* and by municipal law, 218, 219; search of suspected vessels, 454
Poison, not to be used in war, 541–42
Poland, partitions, 130, 559
Political offenders, 239
Ponce de Leon, 146
Porcupine River, 197
Portalis (Mr.), 107
Portsmouth Treaty (1905), 169, 557
Portugal, 108, 146, 151, 176; treatment of enemy persons in Great War, 369, 614–15, 650
Positive, Law of Vattel, 36
Possession, in law in contradistinction to government, 172; by a mixed commission or by alienation, 173
Precedence of states and sovereigns, 267–69
Prescription, 160–61
Prevention, 632–51
Pribyloff Islands, 180
Prisoners of war, 377–84; crews of enemy merchantmen free on conditions, 348–49; followers of enemy army liable, 349–50; historical account of treatment, 377–78; modern rules with regard to, 378–80; ransom, 378; may not be detained at end of war, 378; those who attempt or succeed in escaping, 780; those who are not officers may be set to work, 380; officers must have same pay as they would get in their own country, 382; amenities, 382; states who cannot maintain prisoners must release them, 383
Private International Law, 4–5
Private rights, restored at peace if possible, but subject to treaty provisions, 562
Privateers, 500–502; not used since 1856, 501
Prize Courts, 5, 106–108; 459–63; defined, 460; must administer International Law, 460; present day view of, 461; decisions cannot be revised, 462; jurisdiction and procedure, 463–64; Prize Courts of Allies, 724–25
Prize money, usually given to captors, 459
Produce of estates of neutrals in belligerent territory, 363–64
Projectiles, 529–33
Property, enemy character of, 359–60
Proposal to exempt private property from capture at sea, 477–81; American view, 477
Protectorates, 56, 69, 162–66; colonial, 162–63, 165
Prussia, treaty of 1856 with U. S. A., 105; passes males through the Army, 122; war of Prussia and Italy *v.* Austria (1866) no capture of private property at sea, 479; attempt to establish a volunteer navy, 502

Pufendorff (Samuel), *De Jure Naturae et Gentium*, 7; state of nature 31; views contrasted with Vattel, 34
Public armed forces of foreign states, 225–28
Punishment of war crimes, 543

Quadruple Pacific Treaty (1840), 73, 185; (1921), 580
Quarter, 375–77
Queensland, 149
*Quod vero naturalis ratio inter omnes homines constituit*, 33
*Quousque tormenta exploduntur*, 138

Ransom, 447–48
Rastadt Congress on Rhine tolls, 194
Ratification of treaties, 299–301; whether states are bound to ratify, 300
Ravaging forbidden, 37
Real property, 207
Real unions, 51–54
Realizable securities, 419
Rebels and belligerency, 328–29
*Rebus sic stantibus*, 306
Recall, letters of, 283
Recapture at sea, 448
*Recht* (German), 36
Reciprocity Treaty between U. S. A. and England (1856), 197
Recognition of an independent state, 87–88
Recruiting in a neutral state, 639–40
Red Cross, at sea, 42; and other distinctive signs, 381
Reformation, 23, 115, 265, 660
Renaissance, 23, 265, 271, 660
Renault (Louis) report on International Prize Court, 474; on guilt in contraband, 730; his report on the work of the Naval Conference of London, 730; plenipotentiary of France at Naval Conference, 729
*Renuntiatio Callida*, 571
Reparation, 654–55
Reprisals, 311; negative reprisals or retortion, 312; general, 313; admissibility, 320–21; Oppenheim and Holland on, 428; a second meaning, 543
Requisitions, 423–25; receipts must be given, 423
*Res ancipitis usus*, 709
*Res Nullius*, 145–47
Residents (diplomatic agents), 273
Restoration, 652–54
Retortion, 312
Rhine, 194
Rhodian laws, 16
Ridley (Bishop), 6
Rights, 2
Rights of inhabitants, 413; impressed as guides, 413–14; pillage forbidden, 415; educational institutions should be unhampered, 416
Right of innocent passage, 182–84
Right of passage of troops through neutral territory, 635
Rivers, rights to navigate, 193–97
Roman Empire, 17–24
Romano-German Empire, 19
Roman law, 6, 18–28, 89, 138, 147, 175
Roman Republic, 14–17
Roosevelt (T.), gives up to Russia initiative in calling Hague Conference, 49; on Venezuela, 258; on obligations of Monroe Doctrine, 260–61
Roumania, 39, 58, 87, 100, 158
Rules of war, (1756), 362, 671; (1793), developed, 725
Russia, 75; cedes part of Sakhalin to Japan, 94; arrangements as to Black Sea, 118; Hungary, 131; sells Alaska, 157; recovers Bessarabia, 158; Bering Sea and Convention with England, 178; evades Dardanelles and Bosphorus restrictions, 185, 216, 506; releases *Malacca*, 246, 506; is one of the Great Powers, 246; expels Japanese (1904), 367–68; acquires a volunteer fleet, 502–503; adopts doctrine of continuous voyage, 726
Ryswick, Conference of, 266

Saar Basin, 79, 575
*Sacramentum* or military oath, 16
Safe conducts, 551
Safeguards, 551
St. Lawrence, navigation of, 197
St. Petersburg Declaration (1868), 46, 530
Sakhalin, 94, 495
Saldanha (Count), 615
Salvage, 448–50
San Lorenzo Real (1795), 196
San Marino, 69

San Stefano, Treaty, 49, 247
Sanctions of laws of war, 543–47
*Santa Lucia*, 151
Savage or imperfectly civilized troops, 596–98
Savoy, ceded to France, 129; neutralized province, 595–97; unaffected by Great War, 595; neutralization voided by Treaty of Versailles, 597
Schlegel on convoy, 670
Schleswig-Holstein, 134
Scott (Sir W.), *see* Lord Stowell
Sea fisheries, 189–92
Sea-subsoil, 178
Search, right of, 219–20, 451–57
Seizure of neutral vessels in 1918, 627
Self preservation and intervention, 125
Selden (John), *Mare Clausum* (1635), 176
Sequestration, 403–404
Serbia (or Servia), 39, 58, 87, 100, 247, 277
Serpents (in submarine warfare), 511
Settlement, 149; Vattel on, 150
Seward (Mr.), on extradition, 237
Ships, 208, 210–13, 225–28, 228–29, 229–31, 351–53, 362, 431, 437, 457–58, 723, 733
Sick and wounded in war, 384–95
Silesian conflict, decision of League of Nations, 576
Silesian controversy, 109, 405, 665
Slave trade, not piracy *jure gentium*, 218–21, 221–23
Society of Nations *see* League of Nations
Soldiers crossing neutral territory must be interned, 617
Soudan, 74, 76, 170–72
Sound Dues of Denmark, 183
Sources of law, 95–113
Sovereign states, 47–54; not necessarily subjects of International Law, 50, 69, 136; on high seas, 175–78
Spain, signs Suez Canal Convention, 40, 187; Netherlands Treaty (1656), 106; War of Spanish Succession, 128; claims on America, 146–154, 177; receives Louisiana from France, 158; cedes Philippines to U. S. A., 158; spheres of influence, 154, 166–67; possessed Louisiana and Florida, 196; invited to Naval Conference of London, 251; and the Monroe Doctrine, 256; and Cuba, 257; adheres to Declaration of Paris in 1907, 668
Spain and Netherlands Treaty (1650), 136
Spheres of influence, 166–67
Special mediation, 565
Spion Kop, British soldiers at, 550
Spies, 350, 498–500
Sponsions, 554
Staatenbund, 60–63, 79
State, definition, 48 n.; continuous, 88; loses its existence, 89; succession discussed, 89; possessions, 136–37; limits to territory claims, 154; jurisdiction over persons and things within its territory, 199; jurisdiction over ships on high seas, 210–13; border district magistrates, 213; jurisdiction over pirates seized by its vessels, 214–18; claims jurisdiction over foreigners for offences committed abroad, 221–23; remedies against men of war in its harbors, 231; may refuse a particular Ambassador, 278; captured subjects from an enemy army are traitors, 346; cannot commandeer those who are not its citizens, 347; occupation, 417; invader may not destroy or permanently injure enemy property, 418; purchase of property by a neutral state is violation of neutrality, 418; legal documents and state archives, 419; works of art or history, 419; compensation (Hague Convention 1907), 543; may withdraw or be expelled from League of Nations, 571
*Status per vim certantium, qua tales sunt*, 309
Stikine River, 197
Stock in public debt, held by enemy subjects, 405
Stoessel (General), capitulation at Port Arthur, 555
Story (Joseph), his eminence as a Prize Court judge, 107; on the *Marianna Flora*, 451; his views on neutral jurisdiction over belligerent captives, 656–57
Stowell (Lord) (Sir W. Scott), his

eminence as a Prize Court judge 107; introduces Doctrine of "continuous voyage", 108; uses French Marine Ordinance, 110; on *The Anna* and on *Alluvium*, 143; on case of John Brown and on ships in foreign harbors, 226; embargo, 315; commercial intercourse in war, 333–37; on *The Vigilantia*, 354; on *Domicile*, 356–58; neutral goods found on board an enemy merchantman, 363; cartel ships, 435; on fishing boats, 436; on salvage, 450; on proximate acts of war, 604; convoy, 672–77; judgment on *The Maria*, 673; blockade, 683–85; on *The Betsy*, 685; *Jonge Margaretha*, 713; continuous voyage, 726; contraband, 731; on *The Imina*, 731; on unneutral service, *e.g.* carrying of warlike despatches, 737–38
Strassburg transfer (1697), 92
Stratagems, 538, 540
Strategic blockade, 683
Stress of weather does not give immunity, 441
Suarez (Francisco) *Tractatus de Legibus et Deo Legislatore*, 25
Subjects of western states resident in eastern countries, 332–35
Submarines, must obey existing Laws of Nations, 467, 518–21; same legal position as surface warships, 518; S. S. Hall on larger submarines, 520; and right of asylum, 620
Submarine cables, 422, 607–12; Hague Conference code of Land Warfare, 607; connecting two portions of belligerent territory, 608–609; connecting territories of two belligerents, 609; territories of two neutrals, 611–12; Institute of International Law on, 611; connecting territory of a belligerent and a neutral, 609–611
Submarine mines, 511; observation and mechanical mines, 512; practice in Great War, 517, 518; placed secretly off an enemy's port, 688
Suez Canal, neutralization of, 40, 186–89; a neutralized waterway, 599
Sultan's Firman of 1841 and 1879, 73
Superstition in place of law, 31
Supreme Council of the Powers, 576
Suspension of arms, 556
Suzerainty, 56, 161
Sweden, 52, 86, 176, 409, 579, 586, 672, 705
Switzerland, 60–64, 70, 592–93, 595–99, 617–618, 640
Syria, 88

Tear shells not illegal, 531
*Temporanta Belli*, 97
Terceira expedition, 615
*Terrae dominium finitur ubi finitur armorum vis*, 138
Territorial possessions, extent of, 137–43
Territorial rights, 182–84
Territorial sovereignty, 23
Territorial Waters Jurisdiction Act (1878), 209
Territory necessary but not sufficient for a subject of International Law, 50–51
Tewfik Pasha, 73
Texas, 86, 89
Thirty Years' War, 27–37, 396, 408
Titles of sovereigns, recognition of, 269
Togo (Admiral), attack on Russian fleet, 323
Torpedoes, 512, 516, 518, 529; torpedo and neutral boats, 604
Trade in arms, convention for control of, 102
Trading with Enemy Acts, 403
Transvaal (or South African Republic), 83, 92, 116, 365
Travellers, 207
Trawlers with mine sweeps, 436
Treaties, *see* also Towns (*e.g.* Berlin, St. Petersburg), how far binding, 302; no rule, 304; ratification, 299–300; need not be ratified, 300; League of Nations, 301; interpretation and obligations, 302–307; and war, 337–44; those to which others besides belligerents are parties, 337–40; between belligerents only, 340–44; treaties of peace of Great War, restored various works of art to original owers, 420
Tribonian, definition of *Jus Gentium*, 33
Triple Alliance (1668), 130
Tripoli, 93
Truces, 555–58

Turkey, signs Suez Canal Convention, 40, 72, 75; suzerain of Bulgaria (1878–1909), 57; of Roumania, 58; of Crete, 72; Cyprus, 72; its position in Egypt, 73–74; received with family of nations, 88; the Black Sea, 118–119; Dardanelles and Bosphorus, 184–86; under authority of Great Powers, 247–48; loses Bosnia and Herzegovina, 305
Twiss (Sir Travers) *Law of Nations*, 98, 153; hovering acts, 182; accepts volunteer navy, 501

Ultimatum, 326
Ulpian on *Jus Gentium*, 34
Undefended place, 523
Undue stay, refers to ships, 640–44
Unions, various kinds, 51–54
Unitary states, 51
United Netherlands and Spain Treaty (1650), 662
United States Washington Treaty, 38; on federal unions, 53; dealings with Indian tribes, 55; Cuba, 59–66; recognized by France, 86; independence of Texas, 86–87; Panama, 86–87; Congo, 87; American Society of International Law, 98; neutrality obligations, 109; instructions for its armies, 110; position of authority in New World, 118; intervention in Cuba, 122–23; boundary questions, 152–53; signs Final Act of West African Congress, 154–55; purchases Alaska, 157; obtains Philippines from Spain, 158; claims Bering Sea fisheries, 178–81; assists in abolishing sound dues, 183; controls Panama Canal, 188–89; controversies with Great Britain as to fisheries, 190–92; citizenship by birth, 199–200; by naturalization, 201–203; protection given to citizens abroad, 203–206; controversy with Great Britain as to impressment of seamen, 210–14; consular courts, 234; position as a Great Power, 248–51; wars with Spain and Algeciras, 249; Woodrow Wilson at Peace Conference, 249; Treaty of Versailles, 254; state system, 255–62; no European claims territory on American continent, 256; controlled French intervention in Mexico, 257; formulates and develops Monroe Doctrine, 259–62; heads the Pan-American movement, 262–65; first employs Diplomatic Agents (1893), 275; abolishes prize money, 459; makes International Law part of Law of Land, 460; America and International Prize Court, 475; proposal to exempt private property from capture at sea, 475–81; refuses to sign Declaration of Paris, 501; private ships, 504; naval bombardments, 524; proposed that International Prize Court should have functions of High Court of Arbitral Justice, 569–71; submarine cables, 609–611; reparation for seizure of *The Florida*, 622; its attitude towards the rules "free ships, free goods" and "enemy ships, enemy goods," 661, 662; acts as though she had signed Paris Declaration, 667; blockade of coast of southern Confederacy, 683–85, 688
United States and Canada Treaties (1783 and 1818), 191
United States and Prussia Treaty (1785), 105
United States and Great Britain Treaty (1846), 147, 153
Unnecessary suffering, 529
Unneutral service, 737–45; its nature and name, 737–740; not same as contraband, 737; lesser offences; 740–743; grave offences, 743–745
Usages, 11
*Uti possidetis*, after restoration of peace, 561; treaty of peace often overrides, 562
Utrecht, peace of (1713), 129
Utrecht, Treaty of, 190

Valin (R. J.) (1760), comments on French marine ordinance of 1681, 110
Vattel (Emerich), theory of a state of nature, 31; and Pufendorff, 34; necessary and positive laws, 36; on ravaging, 37; on neutrality, 97, 586; on discovery and occupation, 150–51; on residents and diplomatic ministers, 273; on interpretation of treaties, 302; enemy persons, 367; right and expedi-

ency of expulsion, 368; sequestration, 401; respective rights of military occupant and sovereign, 408–417; devastation, 534–35; neutrality, 586; belligerent levies in neutral territory, 634
Venezuela, 89; its relations with Europe and U. S. A., 258–59; 289, 314, 319, 697
Vereeniging, Peace of (1902), 83, 424
Verrazano (Signor), 146
Versailles Treaty (1919), 70, 100; on international rivers, 194–95; not ratified by America, 301; war criminals to be handed over, 546
Vespucci (Amerigo), 146
Vienna Congresses (1814–15), 129, 194, 246, 274–76, 597
Vienna (Peace of) (1815), 129
Vienna Treaty, 402, 595
Visit, 451
Vladivostock, 466, 504
Volunteer navy, 502–505

War, definition of, 304; general discussion, 309–311; declaration, 321–28; necessary according to Hague Conference (1907), 322; warning and declaration, 323; its beginning, 324; notice must be sent to neutrals, 327; outbreak of, 333–37; commercial intercourse, 333–35; provision must be provided for a crew of such ship, 348–49; violence in, 371–72; codes, 372–75; termination of, 559–60; sometimes two treaties are necessary, 559; doctrine that war is a school of manly virtue, 563–64; warlike expedition, 614–17; warships may be sold to another Power in peace time, 630; German war area, 703
Washington (George), action with regard to Mons. Genêt, 280, 460, 588; on prize courts, 460; efforts to maintain an honest neutrality, 588–590
Washington Conference (1921), 103, 251, 254; and Monroe Doctrine, 261; right to search vessels, 467; submarines, 520–21, 545; 575; forbids poisonous gases and analogous liquids, 532
Washington Treaty (1871), 38, 104, 192, 197; first use of phrase "base of operations," 520–21, 613, 633, 655, 692
Webster (Daniel), protector of naturalized citizens, 204; impressment of British seamen on board American vessels, 212
West African Conference (1884–1851), 83–84; 100, 155, 165, 197, 248, 598–99
Westlake (John), *Chapters on International Law*, 17, 25; on *droit* and *recht*, 36; territorial sovereignty, 136; colonial protectorates, 166; on extra-territorial crime, 222; political offences, 239–241; reprisals, 320–21; military necessity, 374; offence of breaking blockade, 681
Westminster Treaty (1756), 406
Westphalia, Peace of (1648), 116, 129
Wheaton (Henry), *Elements of International Law*, 10, 98; divisions of International Law, 111; protection of naturalized citizens, 204; extra-territorial crime, 242
Whitehall Treaty (1661), on contraband trade, 705
Whittuck (E. A.), International documents, 40
Wilson (Woodrow), 479
Wisbuenses Leges, 22
Woolsey (T. D.), enemy and neutral vessels, 466
World agreements or International Unions, 254

Yukon River, 40

Zanzibar, British protectorate (1890), 163; International Information Bureau, 220; pacific blockade, 318
Zouch (R), *De Jure Feciali, sive Judicio inter Gentes*, 7